

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LAWN MANAGERS, INC., a Missouri Corporation,
Plaintiff,
v.
PROGRESSIVE LAWN MANAGERS, INC.,
a Missouri Corporation,
Defendant.

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) No 4:16-CV-00144-DDN
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NON-JURY TRIAL - VOLUME 2
BEFORE THE HONORABLE DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE
OCTOBER 31, 2017

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(PROCEEDINGS STARTED AT 9:10 AM.)

THE COURT: You may continue.

MR. KELLY: Thank you, Your Honor.

CROSS-EXAMINATION CONTINUED

BY MR. KELLY:

Q Good morning, Ms. Alcorn.

A Good morning, Mr. Kelly.

Q Yesterday we were talking about certain exhibits in the black notebook in front of you. I would like you to turn to Exhibit L-5.

Your Honor, that exhibit is not paginated; so I did a handwritten one in the notebook right next to -- there.

THE COURT: Okay.

MR. KELLY: For that exhibit.

Q (BY MR. KELLY) And we were speaking yesterday about customers receiving the "we want you back" mailer in July of 2016. Could you turn to page 19 in reference to customer Andy Conover, please.

A Okay.

Q Thank you. And according to this note, it said "Mr. Conover called, wondering why he wasn't notified he was with another company"; correct?

A That's what the note says, yes.

Q There's no indication that he was confused about anything that Progressive did?

1 A It's not noted on here, but this isn't my call.

2 Q And this came in -- this customer interaction came in
3 after the letter Lawn Managers sent in July 2016; correct?

4 A It came in on August 30, 2016.

5 Q And was it in response to that mailer going out?

6 A It doesn't say that on here either.

7 Q It does indicate that this is one of the customers that
8 had been award Ms. Smith in 2012; correct?

9 A It does.

10 Q And that would have been a customer who received the "we
11 want you back" mailer; correct?

12 A He would have.

13 Q Could you turn to the next page, page 30. I believe it's
14 Patty Force.

15 A Okay.

16 Q Is there any notation in there about this customer being
17 confused about any words or trademarks Progressive is using?

18 A No.

19 Q This is a customer inquiring about being switched to
20 another company and not being notified; correct?

21 A That's correct.

22 Q And it indicates she was upset; correct?

23 A Yes.

24 Q Thank you. Would you look at page 21, customer Angela
25 Colbert.

1 A Yes.

2 Q This is another customer that indicated that she was
3 unaware of the change; correct?

4 A That's correct.

5 Q And that was not until after the "we want you back"
6 mailer went out?

7 A 8/23/16, correct.

8 Q There's no complaint of being confused in this customer
9 complaint?

10 A Not written on this note, no.

11 Q Would you turn to page 23, please. This is another --

12 A Is that Susie Green? I'm sorry. My pages aren't --

13 Q No. It's Steven Krejci, K-r-e-j-c-i.

14 A Okay.

15 Q This is a report of another customer calling in, not
16 knowing he was transferred to Progressive in 2012; correct?

17 A Correct.

18 Q And this is in response to the "we want you back" mailer
19 that went out; correct?

20 A Yes, it was.

21 Q Would you turn to page 24, please.

22 A Can you tell me the name? I'm sorry.

23 Q Yes. Theresa Brueckmann, B-r-u-e-c-k-m-a-n-n.

24 A Okay.

25 Q And this is a note from a customer indicating that she

1 just received the letter from Lawn Managers; correct?

2 A Yes.

3 Q And that would again be the "we want you back" letter?

4 A Well, she says, "I just received a letter from you."

5 Suggested customer read letter from her current provider. It

6 doesn't say she received our letter. She just says she

7 received a letter from us and if she was confused on her

8 company.

9 Q And this is a customer that would have received the "we
10 want you back" letter in July?

11 A They would have, yes.

12 Q Yes. And would you turn to page 25, please. Customer
13 Mark Barbee, B-a-r-b-e-e.

14 A Yes.

15 Q This is another customer calling and asking to explain
16 the letter that she received?

17 A That's correct.

18 Q And that was about having been switched to another --

19 A That's correct, yes.

20 Q Would you go back to -- well, hold on a second. Let me
21 just ask you this. As part of the protocol in handling these
22 calls, was it the policy of Lawn Managers to ask and to try to
23 determine whether a customer was confused simply because
24 Progressive was using the name "Progressive Lawn Managers"?

25 A No. We didn't ask them if they were confused. We

1 just -- they just asked if something about our company, like
2 they believed they were our customer, and we said, "I'm sorry,
3 you're not our customer," no, we didn't probe them for
4 confusion.

5 Q Could you turn to Exhibit 86, please. And page 7. Do
6 you recognize the email?

7 A I do.

8 Q And this is from Mr. Brad Furfaro?

9 A Yes, it is.

10 Q Would you look at the third paragraph.

11 A Okay.

12 Q Would you read that, please.

13 A "Oh, I just got something in the mail from Progressive
14 Lawn Managers. Who the hell is this? I thought it was you
15 guys at first. They quoted me for one of my very first jobs I
16 ever did."

17 Q Is there any indication in this email that he was
18 confused by anything other than the name "Progressive Lawn
19 Managers"?

20 A He was confused about the mail that he got from
21 Progressive, yes. That's all I see in here.

22 Q No indication that he was confused by anything -- usage
23 of the words "Lawn Managers" alone by Progressive?

24 A No. He was confused because he was being marketed by
25 somebody with the name "Lawn Managers," the same as ours. If

1 he would have got a letter from TruGreen, this email wouldn't
2 have came to me.

3 Q And he actually put the words "Progressive Lawn Managers"
4 in quotes, didn't he?

5 A Yes, he did.

6 Q So whether he was confused just because the name was
7 "Progressive Lawn Managers" or for some other reason, you
8 don't know?

9 A I don't know, no.

10 Q All right. Would you turn to page 55, please.

11 MS. RYAN: Mr. Kelly, would you identify the
12 customers. The page is not numbered.

13 MR. KELLY: Yeah, it's actually the filtered customer
14 cancel report.

15 MS. RYAN: Okay.

16 THE COURT: Now, these -- I don't --

17 MR. KELLY: Oh, it's in Exhibit 86. It should be
18 numbered. For the record, it's a filtered customer cancel
19 report-simple dated 12/16/15.

20 Q (BY MR. KELLY) Is that correct, Ms. Alcorn?

21 A That's correct.

22 Q And this is a list that you prepared; is that correct?

23 A That's correct.

24 Q And were you preparing this in view of the possible
25 lawsuit that was filed in January 2016 against Progressive?

1 A No. I was preparing this to show Randy the customers we
2 lost because of the marketing letters that Linda sent out in
3 November of 2014.

4 Q Okay. And you thought there was something wrong with
5 those letters that went out?

6 A They were -- yes, I did, because you don't market in
7 November. And I believed that some of the people that she
8 marketed she pulled off of the court-provided reports that we
9 gave to her.

10 Q Did you ever see the letter that you thought went out?

11 A I did. And I only spoke to the customers about it.

12 Q So you did?

13 A I did not. I just spoke to the customers about it.

14 Q But you know it went out in November of 2014?

15 A Yes.

16 Q And this is a list of customers who cancelled between
17 November of 2014 and May 2015; correct?

18 A That's correct.

19 Q And this document, according to your testimony, reflects
20 not just when the customers were cancelled but when the
21 customers requested cancellations; correct?

22 A I don't understand what you mean.

23 Q Well, you cancel -- when the customer requests a
24 cancellation, you cancel them immediately?

25 A Absolutely, yes.

1 Q So these customers requested cancellation between
2 November 1 of 2014 and May 31, 2015?

3 A That's correct.

4 Q So some of these customers did not request cancellation
5 until May of 2015?

6 A That's because they thought we were treating their lawn
7 in the beginning, and we didn't catch it until we came by and
8 treated it and then asked for their money and they said, "I
9 already paid."

10 Q And you learned that in -- and up to May 2015?

11 A Through -- yeah. I figured by the time May was over, all
12 that had already been -- the customers had been addressed.

13 Q So these customers had cancelled based on something they
14 received from Progressive in November of 2014?

15 A Yes.

16 Q And at the time, Progressive was allowed to use the words
17 "Lawn Managers" to market itself; correct?

18 A They could.

19 Q So according to this document, something Progressive did
20 in November of 2014 was causing cancellations to Lawn Managers
21 into 2015?

22 A That's correct.

23 Q Now, would you look at that list, please. What's the
24 last name on that list?

25 A Patrick King.

1 Q Is that the same Patrick King who came and testified
2 yesterday and testified he didn't know Linda's business was on
3 120 Old Meramec Station?

4 A I didn't hear his testimony, but it was the Patrick that
5 was here, yes.

6 Q Now, according to this report, Mr. King was a Lawn
7 Managers customer but cancelled because of something he
8 received from Progressive; correct?

9 A No. His name is crossed out. Only the ones with the
10 check marks are the ones that were cancelled because of what
11 they received from Progressive.

12 Q So why is his name on the list?

13 A Because he did cancel his account during that time, I
14 believe, because he was dealing with cancer and he couldn't
15 handle the expenses; so he cancelled his account. So anybody
16 that cancelled -- what I was calling up here, you notice
17 there's some other ones that are crossed out too. I'm not
18 blaming those on PLM. I'm blaming -- those are our real
19 cancels. Only the ones with the check marks.

20 Q I see. I got you, okay. All righty. Did the letter
21 that's denoted the fraudulent letter, did it go out in
22 response to that November 14 mailer?

23 A Yes, it did.

24 Q I'm going to hand you what is marked as Defendant's
25 Exhibit P-3. Ask you just look at those and let me know when

1 you're done looking at that.

2 A Okay.

3 Q Do you know who prepared that?

4 A It -- probably Crystal since she has control over
5 QuickBooks at this time or when this was dated.

6 Q And do you have any knowledge whether that's a true and
7 accurate list of bills for Lawn Managers U.S. Postmaster for
8 all the transactions for the period from May 2, 2012, to June
9 30, 2016?

10 A Through August 2013?

11 Q No. June 30, 2016.

12 A Oh, I'm sorry. I see it going through July 10. I see
13 December 20. Oh, sorry. I see a July 10, 2016, at the very
14 top.

15 Q That's the day it was printed; correct?

16 A That's the date the bill was entered. I'm sorry. I'm
17 looking at the due date. I'm sorry. The other date, yes,
18 6/30.

19 Q Okay.

20 A Yeah. 6/30/16, yes.

21 Q So it's a true and accurate --

22 A It should be accurate, yes.

23 MR. KELLY: Great. Thank you. I don't have any
24 further questions, Your Honor.

25 THE COURT: All right. Redirect?

REDIRECT EXAMINATION

BY MS. RYAN:

Q Ms. Alcorn, you were asked about the "we want you back" letter?

A Yes.

Q Just to be very clear, who did that go to?

A That went out to the customers we lost in 2012 and 2014.

Q And was there confusion generated by that letter? Were customers confused by the letter? Mr. Kelly just showed you a bunch of phone calls from people.

A I don't think they were as much confused as they were a little disheartened that they weren't informed in the beginning. They were discouraged because they weren't told that they were being serviced by another company, and then it was coming from us, you know, that -- after all of that time.

So I think it was -- it wasn't so much confusion because the letter was kind of clearing up what had happened in 2012. It was more of they were upset that they hadn't been notified.

Q All right. Thank you. Now, you were asked yesterday about records of phone calls, the print screens with the notes that were written by you.

A Yes.

Q Were any of those forged?

A Absolutely not.

1 Q Were any of them generated days later by you?

2 A No.

3 Q Just quickly, the process again for generating those
4 notes was what?

5 A When the customer would call, we asked them their
6 address. When we pull the address up in the system, if they
7 are not our customer, especially if they were previous
8 customers, but some of the calls would actually come from
9 accounts that we had the address in our system but no customer
10 had ever been associated with it. So immediately we would do
11 a print screen, and then we would -- as soon as we got off the
12 phone with the customer, we would document what that
13 conversation was about, and then it would just be thrown in a
14 bin.

15 Q Now, you have been asked several times about the
16 marketing letter to -- that has the name "Furfaro Design" at
17 302 Gore?

18 A Yes.

19 Q In Webster Groves; right?

20 A That's correct.

21 Q Somewhere around page 6 of Exhibit 86 -- you don't need
22 to pull it out. It's okay.

23 A I know it, yeah.

24 Q And then you were asked whether you have coded that as
25 commercial prior to May 1 of 2012?

1 A Correct.

2 Q And did you code that as commercial prior to May 1 of
3 2012?

4 A No.

5 Q Did you have access to change the coding of customers?

6 A No. I had no access -- really even after May 1, after
7 the companies had divided, I still had no access to our
8 server. I was pretty much locked out of the server. So it
9 wasn't until the end of May that, at that point in May, the
10 companies were separated. So if anybody new came in, then I
11 would have coded them. Prior to that, Linda was in control.

12 Q And by the time you had access, Linda wasn't there
13 anymore; correct?

14 A She left shortly after that, yes.

15 Q Did you change any coding between the time you had access
16 and when Linda was no longer in the building?

17 A Not on anything that were her accounts. On some of
18 Randy's zip codes if they were commercial accounts that hadn't
19 been marketed in years, I started cleaning up the computer,
20 but other than that, no, I made no changes.

21 Q Now, you were asked about customers who called in after
22 the restraining order and the preliminary injunction were
23 entered in the Hillsboro case. Did you actually see those
24 orders, or were you just told about them?

25 A I believe I was just told about them.

1 Q And you were asked whether that was the first time that
2 customers had been told there was a separation. Do you know
3 the answer to that?

4 A I'm sorry?

5 Q Let me just skip that. Strike that question.

6 Do you get any calls for other lawn service companies
7 that are confused about whose customer they are, like
8 TruGreen, Rottler, any other company?

9 A Nowhere near this volume. Since I've been back in 2012,
10 we might have had two calls from Lawn Masters but nothing like
11 the volume of this.

12 Q What is Lawn Masters?

13 A It's a lawn care company that does pretty much the same
14 thing we do.

15 Q You were asked whether, when the logo changed, did --
16 logo. When Lawn Managers' logo changed, in other words the
17 color was changed to blue on everything -- well, first of all,
18 when did that occur?

19 A That occurred -- it was discussed and prepared for at the
20 end of 2014 and took effect in the beginning of 2015.

21 Q And you were asked whether you did anything to announce
22 it. Were any letters sent out?

23 A I did a newsletter to our customers, and I posted it on
24 Facebook.

25 Q And by "newsletter," what do you mean?

1 A I mean we have a newsletter that goes out three to four
2 times a year to communicate with our customers, things we're
3 seeing in the lawns, things that are going on; so when we
4 changed the colors of our logos and we were putting the actual
5 logos on the truck and changing that, we wanted them to be
6 aware of who we were. So, yes, I posted it on Facebook, and I
7 sent out that newsletter. Customers opt in by giving us their
8 email addresses.

9 Q So it's not a paper newsletter?

10 A It's not a paper newsletter.

11 Q It's email only?

12 A Yes.

13 Q Only to active customers?

14 A Only active customers, yes.

15 Q You've been asked about that postage report.

16 A Yes.

17 Q Did you generate that?

18 A No, I did not.

19 Q Do you know what system it came out of?

20 A QuickBooks.

21 Q When a customer calls in and says they saw a truck in
22 their neighborhood and they're trying to get service, do any
23 ever say whose trucks they saw?

24 A No. They just say, "We saw a truck."

25 Q And this morning you were asked about a series of

1 customers who were calling in, inquiring about being switched
2 to another company. They weren't notified, a whole bunch of
3 people who weren't notified according to what they were
4 saying. All of those phone calls were in 2016; correct?

5 A The ones I was just looking at?

6 Q Yes.

7 A Yes.

8 Q What was the date that Linda was supposed to -- or
9 Progressive was supposed to stop using "Lawn Managers" by
10 itself?

11 A December 31, 2014.

12 Q Going to the filtered customer cancelled report that you
13 just testified about.

14 A Yes.

15 Q I want to be very clear about that. Whose customers were
16 they? Let's say whose customers were they as of July 25,
17 2014?

18 A They were Lawn Managers' customers.

19 Q And you said information was disclosed. What information
20 was disclosed?

21 A With all of the reports we had to provide through the
22 court system, their names were disclosed; so -- and I can look
23 at some of the reports now, see those names that she would
24 have no knowledge of because those customers came to us after
25 2012. They were a family friend of one of our technicians.

1 So that's -- I believe that's what was taken, along with their
2 address, their names. Possibly -- I don't remember -- all the
3 reports provided possibly sizes because you need sizes to
4 determine price.

5 Q So in other words, you're saying that information was
6 produced in the Hillsboro contempt proceedings in 2014 by Lawn
7 Managers?

8 A Yes.

9 Q It was produced to Progressive?

10 A Yes.

11 Q And from what you can tell, Progressive used that
12 information to send out marketing letters?

13 A Yes.

14 Q You've been asked about -- you've been asked about Lawn
15 Managers changing to the blue color?

16 A Yes.

17 Q And I think you were asked whether this was done to copy
18 from Progressive or to make Lawn Managers' signage or whatever
19 look more like Progressive's?

20 A Was I asked that? Yes.

21 Q Yes. I'm displaying on the ELMO -- I don't know if you
22 can see the screen.

23 A I can see, uh-huh.

24 Q A current Lawn Managers' yard sign?

25 A That's correct.

1 MR. KELLY: Is that an exhibit?

2 MS. RYAN: No. We're on rebuttal, aren't we?

3 MR. KELLY: No. Has that been marked as an exhibit?

4 MS. RYAN: No, it has not.

5 MR. KELLY: Your Honor, I would object. How is this
6 rebuttal?

7 THE COURT: Well, I'm going to ask you to mark it,
8 number one; so mark it, please. And the objection is? I will
9 ask you to step up.

10 MR. KELLY: Yeah. I was just -- how is this rebuttal
11 to anything? I mean, I'm not even sure. Now we have a lawn
12 sign produced now for the first time?

13 THE COURT: All right. Was this gone into on
14 cross-examination?

15 MS. RYAN: She was -- it was. She was asked was --
16 did Lawn Managers change their signage to make it look more
17 like Progressive's signage? This is what they changed to, and
18 that's what I'm asking her.

19 MR. KELLY: This should have been given to me before.

20 THE COURT: Do you have one?

21 MR. KELLY: I don't have that sign.

22 MS. RYAN: Your Honor, I can scan it and provide it
23 to him this morning during a break or run a copy.

24 THE COURT: Well, ask the witness what it is.

25 Q (BY MS. RYAN) I've marked this now Plaintiff's Exhibit

1 158. What is this?

2 A That's our current lawn sign.

3 Q And this was developed in the process of changing to the
4 blue color; correct?

5 A Yes, in 2015.

6 Q So it's been used in 2015 and 2016?

7 A Correct.

8 THE COURT: Okay. Now, how is this relevant?

9 MS. RYAN: It's relevant to respond to the question
10 she was asked about whether Lawn Managers changed its signage
11 to resemble Progressive's by adopting the blue color.

12 THE COURT: Did you ask that question?

13 MR. KELLY: I asked if they changed their sign. I
14 don't recall asking if it was specifically closer to
15 Progressive's.

16 THE COURT: All right. I will overrule the
17 objection. That is sufficiently within rebuttal of
18 cross-examination.

19 MS. RYAN: Your Honor, I have nothing further.

20 THE COURT: All right. Anything further of this
21 witness?

22 MR. KELLY: Yes, Your Honor.

23 **RECROSS-EXAMINATION**

24 **BY MR. KELLY:**

25 Q Ms. Alcorn, please turn to page 55 again of Exhibit 86.

1 A Okay.

2 Q Every single customer on here is in Linda Smith's zip
3 code; correct?

4 A Yes.

5 Q And she was free to solicit them at any time since May
6 2012; correct?

7 A Yes.

8 Q And you don't know where she got the information to send
9 mailers out to these customers?

10 A No.

11 Q You're just surmising?

12 A Correct.

13 Q All these addresses are on generally available databases
14 which you can get to send mailers; correct?

15 A The addresses, not the names.

16 Q Well, you can get the names associated with -- you put
17 the names here. You don't know what she sent; correct?

18 A I didn't see it.

19 Q You were asked about the "we want you back" mailer. And
20 I'm going to put this up on the screen. Can you read that?
21 Maybe I will zoom in for you.

22 A It's pretty fuzzy.

23 Q Yes, it is. There we go. Do you see that now?

24 A I can see that.

25 Q Can you read it now, Ms. Alcorn?

1 A I can read it, yes.

2 Q Now, you helped draft this?

3 A I did, yes.

4 Q Okay. And what were the circumstances beyond Lawn
5 Managers' control in May of 2012?

6 THE COURT: Now, was this gone into on redirect?

7 MR. KELLY: She just -- yes. She just asked her
8 about this "we want you back" mailer.

9 THE COURT: Exhibit 51.

10 MR. KELLY: Yes. And it's already in, Your Honor.

11 THE COURT: All right.

12 THE WITNESS: I'm sorry. What was your question?

13 Q (BY MR. KELLY) The question is what were the circumstances
14 beyond Lawn Managers' control in May 2012 that you're
15 referencing in the first line of that letter?

16 A The divorce and the separation of the companies.

17 Q You don't think the divorce was in the control of Mr.
18 Zweifel?

19 A It wasn't in the control of Lawn Managers.

20 Q He wasn't?

21 A No. I'm saying the separation of the customers, you
22 know, we had no control over what he was -- what he had to
23 turn over to Linda. So that's the circumstances beyond our
24 control, because if it would have been in our control, we
25 would have kept all of the customer, but the court ordered him

1 to give the customers to someone else; so that was beyond our
2 control.

3 Q That was a negotiated Marital Settlement Agreement.

4 THE COURT: Okay. I've heard enough about this. You
5 may step down.

6 THE WITNESS: Thank you.

7 THE COURT: We've had enough examination of this
8 witness. You may call your next witness.

9 MS. RYAN: Your Honor, I'm going to call Lisa
10 Kaucher, K-a-u-c-h-e-r.

11 THE COURT: Step up and be sworn, please.

12 **(WITNESS SWORN BY THE CLERK.)**

13 **LISA KAUCHER,**

14 **HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS**
15 **FOLLOWS:**

16 **DIRECT EXAMINATION**

17 **BY MS. RYAN:**

18 Q Good morning. Would you state your name for the record,
19 please?

20 A Lisa Kaucher.

21 THE COURT: Can you be sure and speak up. Maybe
22 louder than you normally speak.

23 THE WITNESS: Okay.

24 Q (BY MS. RYAN) Lisa, by whom are you employed?

25 A Lawn Managers.

1 Q And what is your job title?

2 A Customer service representative.

3 Q And what are the duties of the job?

4 A Assisting the customers, answering calls, and general
5 office duties.

6 Q And how long have you worked for Lawn Managers?

7 A One year.

8 Q Just about exactly one year?

9 A Just about.

10 Q In the course of your duties -- and you take -- you
11 answer calls from people on the phone; correct?

12 A Correct.

13 Q I'd like you to turn to Exhibit 89, if you can find it in
14 those books. And that purports to be a list of -- or a front
15 part of it is a list of calls that you took; correct?

16 A Correct.

17 Q And on the back part of it is the actual print screens
18 and records of the phone calls; correct?

19 A Yes.

20 Q And do we accidentally have a couple pages in here that
21 weren't actually your phone calls?

22 A Yes, we do.

23 Q Are those the ones related to Dan Graney? They're near
24 the front of the group; correct?

25 A Yes, that is correct.

1 Q So we should ignore those couple of pages.

2 THE COURT: State the name, please.

3 MS. RYAN: Dan Graney, G-R-A-N-E-Y.

4 Q (BY MS. RYAN) Your name is on the print screen, but that's
5 not your handwriting?

6 A Correct.

7 Q So you don't really know about this call. You just
8 printed the paper, and somebody else wrote the note?

9 A That is correct. I don't recall.

10 Q Thank you. Now, do you actually recall -- let me ask you
11 this. How many phone calls do you take in a day?

12 A It really varies. It could be anywhere from 20 calls a
13 day to, during marketing, more and then our slow period less.
14 I would say on average 20.

15 Q And I'm asking you personally that's the number of calls
16 you take?

17 A Correct.

18 Q Now, looking at, say, the first print screen in this
19 group, you looked through all of these; correct?

20 A Correct.

21 Q All the others relate to phone calls that you took?

22 A Yes.

23 Q And/or there's a few pages of additional documentation
24 that you might have printed out that related to the call?

25 A Yes.

1 Q What is your process for generating these records of the
2 phone calls?

3 A When a customer calls in and has questions, we ask for
4 their address, and that's how we pull up the customer screen.
5 And if there's any confusion about which company they have
6 their lawn care through, we would print the screen at that
7 time and then write on the bottom what transpires during that
8 conversation.

9 Q So do you have independent recall of any of these phone
10 calls just in general?

11 A For the most part, yes.

12 Q But if I were to ask you about a customer who lived on
13 Hickory Wood Drive call you, can you tell me with a date
14 and --

15 A No.

16 MS. RYAN: Thank you. Your Honor, I would like to
17 offer Plaintiff's Exhibit 89 into evidence.

18 THE COURT: Any objection?

19 MR. KELLY: No objection, Your Honor.

20 THE COURT: It will be received.

21 Q (BY MS. RYAN) Lisa, please turn to Exhibit 91.

22 A Okay.

23 Q And what is that piece of paper there?

24 A That is a record of a phone conversation that occurred
25 that did not come from a customer with an address. It was

1 someone driving on the road that called in.

2 Q And you took the call?

3 A I did.

4 Q Is this in your handwriting?

5 A It is.

6 Q And what was the person calling about?

7 A The person said that someone in one of our work vehicles
8 was driving dangerously or erratically and they were very
9 upset they had been cut off, I believe, by the person in the
10 car.

11 Q And did they say what kind of vehicle it was?

12 A They said it was Lawn Managers, but they said it was a
13 Scion, and we don't own any Scions.

14 MS. RYAN: Your Honor, I'd like to offer Plaintiff's
15 Exhibit 91 into evidence.

16 THE COURT: Any objection?

17 MR. KELLY: No objection, Your Honor.

18 THE COURT: It will be received.

19 Q (BY MS. RYAN) Lisa, just so we have it in the transcript,
20 what was the date of that phone call?

21 A May 31, 2017.

22 MS. RYAN: All right. I have nothing further of this
23 witness, Your Honor.

24 THE COURT: All right. Cross-examination?

25 MR. KELLY: Yes, Your Honor. Just a few.

CROSS-EXAMINATION

BY MR. KELLY:

Q Morning, Ms. Kaucher.

A Good morning.

Q Similar question in that I asked Ms. Alcorn. At any time you were documenting the conversations with these calls, did you seek to determine whether the customer was confused or -- because of the Progressive Lawn Managers name?

A I did not question that. Some of the customers did offer that information voluntarily.

Q And it looks like everyone -- and please take your time to confirm, but everyone in this Exhibit 89 called Lawn Managers after July of 2016. Could you just please count.

A I started in September of 2016; so I couldn't have taken calls before then.

Q Very good. So they all do?

A Correct.

MR. KELLY: Great. Thank you very much. That's all I have, Your Honor.

THE COURT: All right. Redirect?

MS. RYAN: None, Your Honor.

THE COURT: All right. You may step down. Thank you.

MS. RYAN: Chris Lawson.

(WITNESS SWORN BY THE CLERK.)

1 **CHRISTINE LAWSON,**
2 **HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS**
3 **FOLLOWS:**

4 **DIRECT EXAMINATION**

5 **BY MS. RYAN:**

6 Q Good morning.

7 A Good morning.

8 Q Would you please state your name for the record.

9 A Christine Lawson.

10 Q And, Ms. Lawson, by whom are you employed?

11 A Lawn Managers.

12 Q What is your position with Lawn Managers?

13 A I'm a customer service representative.

14 Q And what are the duties of that job?

15 A General office duties, assist the customers when they
16 call over the phone, take a lot of phone calls, assist them
17 with their accounts.

18 Q Now, would you turn to Plaintiff's Exhibit 88. It's in
19 that book. It should have a tab on it. Actually, I should
20 have asked you how long have you worked for Lawn Managers?

21 A I started January 23, 2013. Almost five years.

22 Q Thank you. Turning to Plaintiff's Exhibit 88, are you
23 familiar with that document? It's a group of documents;
24 correct?

25 A Correct.

1 Q It's got a cover page with it; correct?

2 A Correct.

3 Q And then some other print screens and phone call records
4 and other things --

5 A Correct.

6 Q At the very first one -- I'm sorry. Second page of the
7 exhibit, this is Exhibit 88, is that filtered customer cancel
8 report that's been talked about this morning?

9 A Yes.

10 Q If you know. Did you -- on the note on the second
11 page -- I'm sorry -- the third page, has your name, "Chris."
12 Is that something that you generated?

13 A It is. This is a photocopy of a call log detail report.

14 Q And is it -- did you log information on this phone call?

15 A Yes, I did. It was a call log entered into our computer
16 system to Randy.

17 Q And your handwritten note is on that piece of paper?

18 A Correct.

19 Q Just generally, what occurred with this customer?

20 A It appears on May 6 of 2015, I entered a call log. I
21 received a customer from -- a call from a Customer Browne. I
22 let Randy know for his information that "Mr." called. He was
23 confused, wanting to know why he showed a balance on his
24 account, because he had said he had prepaid his account; so
25 there should not have been a balance.

1 THE COURT: Now, what page are you using?

2 MS. RYAN: Your Honor, I'm on the third page of
3 Exhibit 88.

4 MR. KELLY: It's the second customer. Second page of
5 customers; right?

6 MS. RYAN: This.

7 MR. KELLY: Right.

8 MS. RYAN: Here, I'll put it on the ELMO.

9 THE COURT: I just want to be sure that --

10 MS. RYAN: Yeah, let me go ahead and put it on the
11 ELMO.

12 Q (BY MS. RYAN) You have that in front of you; correct?

13 A Correct.

14 MS. RYAN: And, Your Honor, I apologize. I should
15 have numbered the pages within the documents, and I didn't do
16 that.

17 Q (BY MS. RYAN) So this was a call that you took?

18 A Correct, to Randy. Gave the information to Randy. The
19 customer had called, Mr. Browne. Said he was confused,
20 wanting to know why he showed a balance on his account,
21 because he had indicated that he had already prepaid for his
22 account.

23 He also said that his applications were being applied
24 twice, and I explained to him that he had probably paid
25 Progressive. He was going to contact them to find out what

1 was going on, and then he asked that we did not do any more
2 applications on his account until he had found out that
3 information.

4 So my handwritten note at the bottom indicates on the
5 same day he then did call us back to say he was cancelling his
6 account, that he had already paid Progressive, and he was just
7 going to stay with them.

8 Q Thank you. And do you recall the content of these phone
9 calls?

10 A Generally, yes.

11 Q Thank you. Now, there's a number of other records -- 18,
12 20 or so records?

13 A Uh-huh, correct.

14 Q Do you recall the content of each of these phone calls?

15 A Not specifically without reading the information that
16 I've written on them. I do notice it is my handwriting on all
17 of them. Going through them, I can tell you the customer's
18 name. Did you want me to read each one entirely?

19 Q No, no, no.

20 A The date on which they were cancelled. And I did note at
21 the bottom the reason for their call, if they had confusion,
22 basically trying to clear up the confusion or just referring
23 them to any invoices they may have received for clarification.

24 MS. RYAN: Thank you. Your Honor, I'd like to offer
25 Exhibit 88 into evidence. I don't think I did that yet.

1 MR. KELLY: No objection, Your Honor.

2 THE COURT: All right. It will be received.

3 MS. RYAN: And I have no further questions for this
4 witness.

5 THE COURT: Cross-examination?

6 MR. KELLY: Just a few, Your Honor.

7 **CROSS-EXAMINATION**

8 **BY MR. KELLY:**

9 Q Morning, Ms. Lawson.

10 A Good morning.

11 Q In taking these calls, you did not seek to determine
12 whether any of these customers may have been confused simply
13 because Progressive was using the "Progressive Lawn Managers"
14 name?

15 A I did not question the customers. It was voluntarily --
16 the information was voluntarily given to us by the customers.
17 Mostly the reason for their calls was out of confusion.

18 Q And let me ask you about the filtered customer cancel
19 report. It's the second page of the exhibit you were just
20 talking about a few minutes ago.

21 A Uh-huh.

22 Q That's the same report that Ms. Alcorn was testifying to;
23 correct?

24 A It appears.

25 Q Okay. And you attached the page behind it regarding Matt

1 and Lindsey Browne; correct?

2 A That is a photocopy of a call log detail report that was
3 prepared by myself.

4 Q And they are on this list?

5 A That is correct.

6 Q And you attached the call log report regarding Matt and
7 Lindsey Browne because you -- it was associated with this call
8 log report; correct?

9 A I assume. I did not attach it.

10 Q Okay. Well, somebody at Lawn Managers did. Do you know
11 who did?

12 A I do not.

13 Q Okay. In any event, they are ones who received the
14 November 24 -- excuse me -- the November 2014 mailer?

15 A Per this information, correct.

16 Q Yes. And so the record is clear, that was a 2014 mailer
17 from Progressive; correct?

18 A Correct. November of 2014.

19 Q And the Brownes cancelled on May 6, 2015?

20 A Going by this information, I'm not actually looking at
21 the computer screens; so I can't see the entered information.

22 Q That was the day it was entered.

23 A I received the phone call on May 6.

24 MR. KELLY: Thank you very much. That's all I have,
25 Your Honor.

1 THE COURT: All right.

2 MS. RYAN: Your Honor, no redirect.

3 THE COURT: All right. You may step down. Thank
4 you.

5 MS. RYAN: I would like to call Scott Hewett.

6 THE COURT: All right.

7 MS. RYAN: It's H-e-w-e-t-t.

8 (WITNESS SWORN BY THE CLERK.)

9 SCOTT HEWETT,

10 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
11 FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. RYAN:

14 Q Good morning.

15 A Morning.

16 Q Lean forward so that we can hear you.

17 A Oh, you'll hear me.

18 Q Would you state your name for the record, please.

19 A Scott Hewett.

20 Q And by whom are you employed, Scott?

21 A Lawn Managers.

22 Q How long have you worked for Lawn Managers?

23 A Thirty-three years.

24 Q And what is your current position with Lawn Managers?

25 A General manager.

1 Q What are the duties or your duties as general manager?

2 A Day-to-day operation of technicians.

3 Q So would that -- if I called technicians "field staff,"
4 you --

5 A Correct.

6 Q -- supervised the field staff?

7 A Yes. Applicators, yes.

8 Q And how long have you been the general manager?

9 A Eight years, six years -- I don't remember.

10 Q Prior to that, you were employed with Lawn Managers.
11 What was your position?

12 A I started out as different -- I've had different
13 positions over the years. So I started out as an applicator,
14 went to assistant manager, went to manager, so forth.

15 Q Now, when you say applicator and technician, are those --

16 A They're the same, yes.

17 Q Okay. They are the same?

18 A Yes.

19 Q Are those positions -- is there any licensing required
20 for those positions?

21 A Yes.

22 Q And what is that licensing?

23 A Pesticide technician license.

24 Q And who issues the licensing?

25 A The Department of Agriculture.

1 Q And that would be the State of Missouri Department of
2 Agriculture?

3 A Correct.

4 Q And you're very familiar with those rules; correct?

5 A Correct.

6 Q Are applicators required to reapply for licensing?

7 A Yes.

8 Q Periodically?

9 A Every three years.

10 Q Are all of Lawn Managers' employees who apply substances
11 to lawns licensed?

12 A Yes.

13 Q What is the difference between a commercial customer and
14 a residential customer for Lawn Managers?

15 A A residential customer is somebody who you treat through
16 the homeowner themselves. A commercial account is somebody we
17 treat through another service. They are a full-service
18 company that they subcontract us out to actually do the
19 applications on their property that they have.

20 Q And those, the properties where the treatment would
21 occur, could be either residential or commercial in nature?

22 A Correct.

23 Q Do they tend to be more residential?

24 A Yes.

25 Q Now, were you with the company on May 1 of 2012?

1 A Yes.

2 Q And were you with the company in August of 2012?

3 A Yes.

4 Q At that time, did Lawn Managers have commercial customers
5 in Linda's zip codes?

6 A Yes.

7 Q And do you have an idea of how many?

8 A In 2012?

9 Q Yes.

10 A Fifty, sixty.

11 Q Now, were you asked that question in your deposition?

12 A Correct.

13 Q In looking back on your deposition, do you think you may
14 have not understood the question?

15 A I misunderstood, did not know what year it was discussed.

16 Q Are you aware of any efforts from 2012 to 2016 to avoid
17 servicing residential customers -- any efforts made by Lawn
18 Managers --

19 A Yeah.

20 Q -- to avoid servicing -- let me finish the question --
21 residential customers in the zip codes that were assigned to
22 Linda?

23 A Yes.

24 Q And what efforts were those?

25 A Asking them where they lived. If they lived in those zip

1 codes, we just didn't treat them.

2 Q Do you generate the routes that are given to your
3 technicians?

4 A I don't generate them, no.

5 Q Do you hand them out to the technicians?

6 A They're printed a group of invoices, and then they route
7 those invoices. They could get a hundred at a time, which
8 would be a week's worth of invoices. So I don't necessarily
9 route each day. They get a group, and then they're
10 responsible for routing their own invoices.

11 Q And by you give the technician the invoice, they go to
12 the address, they leave the invoice at the address; is that
13 correct?

14 A Correct.

15 Q And if the customer's prepaid, would they also leave an
16 invoice, or what would they leave?

17 A They leave the invoice, yes.

18 Q So that -- and what is the purpose of doing that?

19 A Notification of the application.

20 Q So the customer knows what happened?

21 A Correct.

22 Q Now, when Lawn Managers treated addresses for commercial
23 customers in Linda's zip codes, were lawn signs left, Lawn
24 Managers' lawn signs left?

25 A Depend on the request of the commercial applicator -- or

1 the commercial account. Some requested. Some requested do
2 not leave.

3 Q So it was sometimes, sometimes not?

4 A Correct.

5 Q And just going back for a second like the commercial
6 account, you're meaning the mowing company or the landscaping
7 company, the full-service company that was subcontracting;
8 correct?

9 A Correct.

10 Q Did you have an opportunity to observe the quality of
11 Progressive Lawn Managers' work?

12 A Yes.

13 Q Over the years?

14 A Yes.

15 Q After 2012?

16 A Yes.

17 Q And what's your observation about the quality of the work
18 that Progressive was doing?

19 A The lawns seemed good, they seemed fine, depending on the
20 time of the year, of course, normal stress in summer, but most
21 of the accounts appeared to be in good shape.

22 Q Now, at the time of the division of the companies,
23 division of the accounts, what was the date that you stopped
24 supervising the employees that were going with Progressive?

25 A April 25.

1 Q And why -- do you recall that date specifically?

2 A I just remember it was the end of April. It was right at
3 the time of the separation or -- that was final.

4 Q And that's the year 2012?

5 A Correct.

6 MS. RYAN: Thank you, Your Honor. I have nothing
7 further.

8 THE COURT: Cross-examination.

9 MR. KELLY: Yes, Your Honor.

10 **CROSS-EXAMINATION**

11 **BY MR. KELLY:**

12 Q Morning, Mr. Hewett.

13 A Morning.

14 Q You didn't have any discussions or conversations with
15 customers in the field about Progressive, did you?

16 A Not in the field, no.

17 Q You never discussed with any customers the question of
18 confusion or identity of the companies with any customers
19 since the divorce; correct?

20 A Not that I recall, no.

21 Q And other than seeing the Progressive vehicles driving
22 through the zip codes awarded Mr. Zweifel, you haven't seen
23 any of them treating any residences in those zip codes;
24 correct?

25 A No, I have not.

1 MR. KELLY: Thank you. No further questions, Your
2 Honor.

3 THE COURT: All right. Redirect?

4 MS. RYAN: None, Your Honor.

5 THE COURT: All right. You may step down. Thank
6 you.

7 MS. RYAN: Your Honor, I would like to call Crystal
8 Alcorn.

9 THE COURT: All right. Step up, please.

10 (WITNESS SWORN BY THE CLERK.)

11 CRYSTAL ALCORN,
12 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS
13 FOLLOWS:

14 DIRECT EXAMINATION

15 BY MS. RYAN:

16 Q Good morning. Would you please state your name for the
17 record.

18 A Crystal Alcorn.

19 Q Thank you. By whom are you employed, Crystal?

20 A Lawn Managers.

21 Q How long have you worked for Lawn Managers?

22 A Three years.

23 Q And what is your current position?

24 A I'm currently the office manager.

25 Q And how long have you been the office manager?

1 A Since October 2016.

2 Q Prior to that, what was your position with the company?

3 A Just customer service representative.

4 Q As a customer service person, what were your duties?

5 A Answering the phones, taking care of all the customer
6 needs.

7 Q Lean forward so we can hear you a little better.

8 A Taking care of the customer needs and just the general
9 office duties.

10 Q And in that position did you, and subsequently do you,
11 have occasion to answer the telephone?

12 A Yes.

13 Q Now, you said you became office manager in October of
14 2016; is that correct?

15 A Yes.

16 Q What are your duties as office manager?

17 A I oversee everybody in the office to make sure everything
18 runs smoothly. I enter in all of the payables and
19 receivables, I process payroll, and I still answer phones, and
20 basic general office duties.

21 Q Thank you. Now, I want you to turn to what's been marked
22 as Plaintiff's Exhibit 87. Do you have that in front of you?

23 A Yes.

24 Q The cover page just has a list of names and dates;
25 correct?

1 A Correct.

2 Q Have you looked through the whole exhibit?

3 A Yes, I have.

4 Q And is this a record of phone calls that you took?

5 A Yes, they are.

6 Q And primarily -- and it's primarily notations that are
7 made on what we've been calling "print screens"?

8 A Correct.

9 Q I'm just sort of randomly turning a couple of pages in to
10 Olliver Chrissler. Do you have that one?

11 A Yes, I do.

12 Q It's about the fourth page in on the print screens;
13 correct?

14 A Correct.

15 Q Does that have your handwriting?

16 A Yes, it is.

17 Q And did you take that phone call?

18 A Yes, I did.

19 Q You've looked through the whole exhibit. Were there any
20 that accidentally got in there that weren't actually calls
21 that you took?

22 A Yes.

23 Q There are a few?

24 A There's one.

25 Q There's one. Okay. Do you know the name on that?

1 A Can I just look through?

2 Q Why don't you look at the list on the front and see if
3 you can remember from that instead of taking the time.

4 A It's LMI223.

5 Q Martha Smith?

6 A Yes.

7 Q About page 12; is that right? About the 12th page in?

8 A There's no page number.

9 Q But that's not a call that you took?

10 A No, it is not.

11 Q The rest of them are, though? Okay. Now, what was your
12 process for generating these records?

13 A When the customer calls, we ask them their address and
14 enter it into the computer. It pulls up their customer
15 screen. And if they are not our customer, we try to let them
16 know "you're not our customer." After the conversation is
17 over, we record the conversation on the print screen.

18 Q And do you, at this moment, have independent recall of
19 all of these phone calls?

20 A A couple of them.

21 Q And I really don't want to take the time to go into them
22 individually, but if it has your handwriting, you took the
23 phone call; correct?

24 A Correct.

25 MS. RYAN: All right. Your Honor, I would like to

1 offer Exhibit 87 into evidence.

2 MR. KELLY: No objection, Your Honor.

3 THE COURT: All right. It will be received.

4 Q (BY MS. RYAN) Now, Crystal, in your capacity as office
5 manager, have you been trying to track what's going on with
6 Progressive's website and changes that might have been made to
7 Progressive's website?

8 A Yes. I was instructed to.

9 MS. RYAN: And, Your Honor, at this point I want to
10 offer Exhibit 99, 100, 101, and 102. A couple of those are
11 video files; so I'm going to need to take a moment just to
12 plug the computer in and get that turned on.

13 THE COURT: So each of these are a video exhibit; is
14 that correct?

15 MS. RYAN: Several of them are, yes.

16 THE COURT: Several?

17 MS. RYAN: Some cases we have a piece of paper, kind
18 of a place holder in the book.

19 THE COURT: All right. Is there any objection to any
20 of these four exhibits?

21 MR. KELLY: I'm sorry. I've got 99, 101 --

22 MS. RYAN: 101 and 102.

23 MR. KELLY: What was the other?

24 MS. RYAN: 101 and 102.

25 MR. KELLY: I don't think I object. Let me just look

1 on the exhibit list, please. No. No objection.

2 THE COURT: All right. They will be received.

3 MS. RYAN: I'm not sure I need help connecting to the
4 projection on this, but let me go ahead and pull it up.

5 (VIDEO PLAYED.)

6 THE COURT: What exhibit was that?

7 MS. RYAN: That is Exhibit 101, Your Honor.

8 Q (BY MS. RYAN) Can you turn to 101 in the book, please.
9 Sorry. I don't have a date on it. Crystal, have you looked
10 at this video as of July of this year?

11 A As of July? I don't have a 101 in here.

12 Q Do you have a page that just says "video"; right?

13 A Yes.

14 Q So let me just ask you this. Did you look at the website
15 and look at the video in July of this year?

16 A I did.

17 Q And did it look like this, and was the wording the same
18 in July of this year?

19 A Yes.

20 Q And have you looked at it more recently, the video?

21 A Yes, I have.

22 Q Were any changes made? Like, say, as of the beginning of
23 October of this year?

24 A No.

25 Q So it still shows up as "Lawn Managers" with

1 "Progressive" inside of the logo when you looked at it in
2 October?

3 A In the beginning of October, yes.

4 MS. RYAN: Your Honor, I can go ahead and play 102,
5 but it's identical. Do you want me to go ahead and do that?

6 THE COURT: Yeah, please. So that was 101 that was
7 played. Go ahead and play Exhibit 102.

8 **(VIDEO PLAYED.)**

9 Q (BY MS. RYAN) So, Crystal, is that how -- that was Exhibit
10 102 just for the record. Is that how the video appeared
11 earlier this month, in October --

12 A Yes, it is.

13 Q Thank you. Now, going -- I don't think I had you look at
14 Exhibit 99 yet. Are you familiar with Exhibit 99?

15 A Yes, I am.

16 Q And what is that?

17 A This is the Progressive Lawn Managers site.

18 Q As of what date?

19 A July 6, 2017.

20 Q These are basically printouts from the website; correct?

21 A I'm thinking it is.

22 Q All right. Turning to the second to the last page, is
23 there a little link on there for the video that you can see?
24 Second to the last page?

25 A Yes.

1 Q And that's the video that we viewed; correct?

2 A Correct.

3 MS. RYAN: Your Honor, I would like to offer 99, 100.
4 Maybe I should identify 100. We haven't done that yet. Let
5 me back up.

6 Q (BY MS. RYAN) Turn to Exhibit 100, please. Are you
7 familiar with that?

8 A Yes.

9 Q And what's the date on that?

10 A August 3, 2017.

11 Q So it's another date. And what is that?

12 A That is Progressive Lawn Managers' website.

13 Q Turning again to the second to the last page of that
14 exhibit, is that a link for the video that we just saw?

15 A Yes, it is.

16 Q The same video.

17 MS. RYAN: Your Honor, I'd like to offer Plaintiff's
18 Exhibits 99, 100, 101, and 102 into evidence.

19 THE COURT: They're received.

20 MS. RYAN: Thank you.

21 Q (BY MS. RYAN) Crystal, would you turn to Exhibit 90,
22 please. What is that document?

23 A This is a voicemail we received in July of 2016 from an
24 officer trying to contact us about a Lawn Managers' truck or
25 vehicle that did not pay for gas at a Mobil on the Run gas

1 station, I believe is what it said.

2 MS. RYAN: Your Honor, I would like to go ahead and
3 play this audio file.

4 THE COURT: Any objection?

5 MR. KELLY: No, Your Honor.

6 THE COURT: All right. It will be received. Go
7 ahead.

8 **(AUDIO FILE PLAYED.)**

9 THE COURT: All right. If you're going to offer
10 that -- well, it has been received into evidence -- I'm going
11 to ask you to make a transcript of that. That was not
12 entirely easy for me to understand each of the words that were
13 spoken. So I will task you with preparing a transcript.
14 Provide the proposed transcript to Mr. Kelly and --

15 MR. KELLY: Could we have that before tomorrow, Your
16 Honor, so that I can have my client -- will that be possible?

17 THE COURT: Well, since it will benefit both, the two
18 of you can work together on getting that done, if you wish.

19 MS. RYAN: We'll get it done, Your Honor.

20 THE COURT: All right.

21 MS. RYAN: I would note that this was produced quite
22 a long time ago.

23 THE COURT: All right.

24 MS. RYAN: Thank you. And that was Exhibit 90,
25 actually. I don't know that I offered it yet, but I would

1 like to go ahead and do it.

2 THE COURT: It's received.

3 MS. RYAN: Thank you. I have nothing further for
4 this witness.

5 THE COURT: Cross-examination.

6 MR. KELLY: Yes, Your Honor. Just a little bit.

7 **CROSS-EXAMINATION**

8 **BY MR. KELLY:**

9 Q Good morning, Ms. Alcorn.

10 A Good morning.

11 Q Could you turn to Exhibit 87 in the black notebook in
12 front of you. It has numbered pages.

13 A 87, you said?

14 Q Yes.

15 A Okay.

16 Q And this is the exhibit, the collection of customer
17 interactions, which are mostly yours?

18 A Correct.

19 Q Could you turn to page 6, please, if you could. Just
20 please read and note and let me know when you're finished.
21 The customer is, I believe, Glenn Stahl.

22 A Okay.

23 Q This is a customer in a zip code awarded Linda Smith?

24 A Correct.

25 Q And the call came in on March 1, 2016?

1 A Correct.

2 Q And this customer indicated he got a mailer with Lawn
3 Managers' phone number and address on it; is that correct?

4 A Correct, according to the notes.

5 Q Would you turn to page 9, please. This is a note of a
6 customer interaction on March 18, 2016; correct?

7 A Correct.

8 Q And it involves a customer in another zip code awarded to
9 Ms. Smith; correct?

10 A Correct.

11 Q And you had to -- you had to inform the customer that
12 Lawn Managers doesn't service that zip code?

13 A I'm not sure if this was a customer awarded to her,
14 because it obviously was not in our system. That is why it is
15 on a new sale info sheet, because we put anybody's that the
16 address is not in our system on a page like this, and it looks
17 like I said that we do not service her zip code.

18 Q And that was true at the time for residential customers;
19 correct?

20 A Correct.

21 Q And we can flip through all of these, but you don't have
22 to read them. You had to tell a lot of customers that: "We
23 don't service your zip code." Is that right?

24 A Correct.

25 Q That was before the "we want you back" letter that went

1 out last July of 2016?

2 A It was before our noncompete ended, yes.

3 Q And you had to tell them again once Lawn Managers was
4 enjoined last year; correct?

5 A Excuse me?

6 Q You had to tell the customers that again after Lawn
7 Managers was enjoined last year; is that right?

8 A Right.

9 Q Would you turn to page 29. This is for customer Jackie
10 London; is that correct?

11 A Correct.

12 Q And it's for a customer who was assigned to Ms. Smith
13 back in 2012; correct?

14 A Correct.

15 Q And this came in on September 9, 2016?

16 A Correct.

17 Q And this would have been a customer that received the
18 mailer; correct?

19 A Correct.

20 Q And, now, this customer is asking what the difference is
21 between Lawn Managers and Progressive.

22 A Yes. That's what the note says.

23 Q Would you turn to page 42, please.

24 THE COURT: What was the page again?

25 MR. KELLY: It's 42, Your Honor.

1 THE COURT: All right. Thank you.

2 Q (BY MR. KELLY) It's customer Cindy Roach.

3 A Hold on. I have to flip it around. Cindy Roach?

4 Q Yes. It says she received the letter a couple of months
5 ago, saying that you changed your name to "Progressive Lawn
6 Managers"; is that right?

7 A That's what the note says.

8 Q But there was no letter that, to your knowledge, that
9 went out indicating that?

10 A We never sent a note saying our "Lawn Managers" was
11 changed to "Progressive Lawn Managers," no.

12 Q Now, can you please turn to the next page.

13 A Excuse me?

14 Q Can you please turn to the next page. And this has a
15 copy of a check and looks like your handwriting underneath it?

16 A Yes.

17 Q And in the body of this note it indicates that you
18 returned the check with a letter to the customer explaining
19 that we can't cash it with the wrong address; is that right?

20 A Correct.

21 Q So the bank wouldn't let Lawn Managers cash it if it had
22 the wrong address on it; is that right?

23 A Typically, banks do not cash a check addressed to a
24 company that does not have that address on their account.

25 Q Would you turn to page 46. This is for customer Susan

1 Rhodes; is that correct?

2 A Correct.

3 Q And this was a customer awarded to Ms. Smith back in May
4 2012?

5 A Actually April 25, 2012.

6 Q That's the cancel date; correct? Is that correct?

7 A Correct.

8 Q And when we see that date in these records, it means it
9 was transferred as part of the divorce in 2012?

10 A Correct.

11 Q And this customer, Susan Rhodes, indicated that she had
12 the number programmed into her phone; is that right?

13 A That's what the note says, yes.

14 Q So she had Lawn Managers' number programmed in her phone,
15 but she was a Progressive customer; is that correct?

16 A Correct.

17 Q Had she been solicited by Lawn Managers?

18 A No, she has not.

19 Q Is there any explanation of why she put the Lawn Managers
20 name in her contacts?

21 A I could not tell you that. I was not there.

22 Q And do you have any estimate as to the number of people
23 who called Lawn Managers because they had the Lawn Managers'
24 name in their contacts?

25 A I wouldn't know.

1 MR. KELLY: I don't have any further questions, Your
2 Honor.

3 THE COURT: All right. I do. With respect to -- I
4 mean, and this question and answer had been made a couple of
5 times previously. What phone number would this customer have
6 called?

7 THE WITNESS: You're speaking to me?

8 THE COURT: Yes. It's to you.

9 THE WITNESS: I'm sorry. (636)671-7077. It's a
10 brand-new phone number.

11 THE COURT: So that's the number this customer
12 called?

13 THE WITNESS: Correct.

14 THE COURT: Okay. And when did that number go into
15 effect?

16 THE WITNESS: I think it was May of 2012. Maybe
17 June. I was not there; so I can't tell you for sure.

18 THE COURT: All right. You may follow up, if you
19 wish.

20 MR. KELLY: Thank you, Your Honor. No further
21 questions.

22 THE COURT: Redirect?

23 MS. RYAN: Your Honor, there's something I neglected
24 to do the first time around, if I can just quickly go back to
25 a couple of earlier exhibits. May I do that?

1 THE COURT: Any objection to going back?

2 MR. KELLY: I'm not sure what the exhibits are.

3 MS. RYAN: They're 22, 23, 24.

4 MR. KELLY: No, Your Honor.

5 THE COURT: All right.

6 **REDIRECT EXAMINATION**

7 **BY MS. RYAN:**

8 Q Crystal, do you have the volume with those exhibits in
9 front of you?

10 A It's over here. I'm sorry.

11 Q It's the first one. Turn to Exhibit 22. Just do you
12 have that in front of you?

13 A I do.

14 Q Real quickly, what is that?

15 A It looks like a printout of Progressive Lawn Managers,
16 maybe a Google that I've done.

17 Q Can we turn to the ELMO just a second. Thank you.

18 Did you look at that website around that date or on
19 that date, if you recall? Is that how this particular
20 progressivelawnmanagement.com looked on that date?

21 THE COURT: What date?

22 MS. RYAN: It's April 29, 2016.

23 A I'm not too sure if I printed this one.

24 Q Okay. Well, let's skip over that one, then.

25 Twenty-three?

1 A Yes.

2 Q And are you familiar with Exhibit 23?

3 A Yes.

4 Q And is this something that you printed out off of the
5 internet on September 14, 2016?

6 A Yes.

7 Q It's dated?

8 A It is.

9 Q It's printed in black and white; right?

10 A This one is in color.

11 Q Oh, yours is in color? Okay.

12 A Yes.

13 Q Mine isn't. Sorry. And does this accurately reflect how
14 the Progressive Lawn Managers name appeared on their website
15 on that date?

16 A Correct.

17 Q And that's in September of 2016; correct?

18 A Correct.

19 Q Then turning to Exhibit 24, is this something that you
20 would have generated?

21 A Yes.

22 Q And it's just a different page of the same website on the
23 same date; correct? I believe it was still 9/14. Maybe

24 I'm --

25 A Correct.

1 Q This is something you printed, though; correct?

2 A Yes, it is.

3 Q So you saw this on the internet and printed the page;
4 correct?

5 A Correct.

6 Q And does it show a link to the video that we've played?

7 A It says it's PLMI.US.

8 Q That's the domain or the web address; correct?

9 A Yes.

10 Q Does it show a link for the video that we've already
11 played?

12 A Yes.

13 MS. RYAN: Your Honor, I'd like to offer 23 and 24
14 into evidence.

15 THE COURT: Any objection to either of those two?

16 MR. KELLY: I don't have an objection, but I might
17 have misheard. Did you refer to this as 9/24?

18 MS. RYAN: I might have.

19 MR. KELLY: It's 9/14.

20 MS. RYAN: 9/14. That's fine, thank you.

21 THE COURT: So they were both on 9/14?

22 MS. RYAN: Yes, Your Honor. They are.

23 THE COURT: Well, 23 and 24 will be received. But
24 what's the difference between the two?

25 MS. RYAN: They're just different pages of the

1 website.

2 THE COURT: Oh.

3 MS. RYAN: Perhaps I should have stuck them together.

4 THE COURT: Pardon?

5 MS. RYAN: Maybe I should have put them together, but
6 they're two pages from the same website.

7 THE COURT: All right.

8 Q (BY MS. RYAN) Now, you were asked about having to tell
9 customers "we do not service your zip code" and that you, I
10 think, had to tell people that again after the injunction was
11 entered?

12 A Correct.

13 Q Would that apply only to the customers that were
14 awarded -- actually awarded to Linda in her zip codes in 2012
15 and 2014?

16 A Correct.

17 MS. RYAN: Thank you. Your Honor, I have nothing
18 further.

19 MR. KELLY: No further questions, Your Honor.

20 THE COURT: All right. You may step down. Thank
21 you.

22 MS. RYAN: Your Honor, our next witness will be our
23 expert, and I'm wondering if we can take a short break before
24 we begin that.

25 THE COURT: All right. We'll take a ten-minute

1 recess at this time.

2 MS. RYAN: Thank you.

3 **(COURT RECESSED FROM 10:42 AM UNTIL 11:00 AM.)**

4 THE COURT: You may call your witness.

5 MS. RYAN: We'd like to call Fernando Torres.

6 THE COURT: Step up and be sworn, please.

7 **(WITNESS SWORN BY THE CLERK.)**

8 **FERNANDO TORRES,**

9 **HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS**
10 **FOLLOWS:**

11 **DIRECT EXAMINATION**

12 **BY MS. RYAN:**

13 Q Please state your name.

14 A Fernando Torres.

15 Q Mr. Torres, by whom are you employed?

16 A Our company is IPmetrics.

17 Q Move that closer to your face, please. Thank you.

18 A My company is IPmetrics, LLC.

19 Q And where is the company located?

20 A In San Diego, California.

21 Q What is the business of IPmetrics?

22 A Intellectual property consulting.

23 Q Would you describe just generally what that means.

24 A Basically, we cover all types of intangible assets and
25 intellectual property, and we do valuation work. We do

1 sometimes monetization and expert witness analyses and
2 reports.

3 Q Generally what is the subject matter of what the company
4 consults about?

5 A Well, trademarks, patents, copyrights, rights of
6 publicity are the main -- and trade secrets -- are the main
7 topics. It could be transactions that are being contemplated
8 or have just been consummated, or it could be litigation
9 situations where there is infringement questions.

10 Q Thank you. Would you turn to Exhibit 120. Turning to
11 page 23 --

12 A Just a second. Okay.

13 Q Have you provided -- this is a section of your report;
14 correct?

15 A Yes.

16 Q And does it list your qualifications?

17 A Yes.

18 Q And just briefly, what is your educational background?

19 A Well, I studied economics at the B.A. level in Mexico
20 City and then did a diploma, graduate diploma, in economics at
21 the University of East Anglia in England, did a Master's of
22 Science degree in economics with a specialty in econometrics
23 from University of London. And as far as educational, that
24 would be the bulk of it.

25 Then I started working as an economist in the

1 government in Mexico City and teaching economics at the
2 university at my alma mater.

3 Q Which is?

4 A The Metropolitan University.

5 Q Thank you. How long have you been working as a
6 consultant with IPmetrics?

7 A With IPmetrics since 2010. So it's going to close on the
8 seventh year.

9 Q Prior to that, what were you doing?

10 A I was pretty much in the same function with another
11 company called CONSOR, you know, like intellectual property
12 consulting. And that was from 2005 through 2009.

13 Q And did you ever work specifically for a single company?

14 A Not as an IP consultant, no.

15 Q No, okay. So your consulting work has been since the
16 time that you worked for --

17 A Yes, the last 12 to 13 years.

18 Q Thank you. And you've listed some memberships on this
19 list of qualifications. What organizations are you a member
20 of?

21 A Mainly the National Association of Forensic Economics and
22 the American Economic Society, well, Economic Association, the
23 Western Economics Association International, and the
24 International Trademark Association. And those would be the
25 main ones.

1 Q And then going to the second page, page 24 of the report,
2 the second page of the qualifications, you have a list of
3 speeches and presentations; correct?

4 A Yes.

5 Q And the dates for all of those?

6 A Correct.

7 Q And there's a number of them, of valuation topics that
8 you've spoken about; correct?

9 A Yes.

10 Q Valuation and damages calculations.

11 A Yes.

12 Q Thank you. And there's a separate list of publications;
13 correct?

14 A Yes.

15 Q On page 25?

16 A Yes.

17 Q With the number of things that you've written; correct?

18 A Yes, things I've written -- articles, book chapters,
19 things of that nature.

20 Q And were any of those written with other people, or are
21 they all your own work?

22 A Well, the articles, the blog posts, and the chapters that
23 are mentioned here, I wrote them by -- on my own. Obviously,
24 the book chapters are included in a edited book that have a
25 long volume, yes.

1 Q Volume. Thank you. Now, turning to page 27, have you
2 provided a list of your litigation-related experience?

3 A Yes.

4 Q And was it your understanding that the federal court
5 rules require you to provide this information?

6 A Yes. By Rule 26, I need to provide the past four years
7 of litigation-related involvement.

8 Q And that's what pages 27 --

9 A And 28.

10 Q -- and 28 are; correct?

11 A Yes.

12 Q You have this case actually listed at the bottom of 28?

13 A Yes.

14 Q Now, prior -- I just want to run through this quickly.

15 Appendix B is a list of the documents you consulted in
16 preparation of your report; correct?

17 A Yes.

18 Q And did that include tax returns for both Lawn Managers,
19 Inc. and Progressive Lawn Managers, Inc.?

20 A Yes.

21 Q Did it also include financial statements for both
22 companies?

23 A Yes.

24 Q And those were provided to you by me; correct?

25 A Yes.

1 Q Did you review any other documents?

2 A Well, there were what I would call operational reports,
3 services done by zip code, services summaries, and outside
4 sources that I consulted usually, but within the documents
5 produced in the case, those would be the documents.

6 Q Okay. Then it continues on to page 30; correct?

7 A Yes.

8 Q And then there's some other government sources and other
9 information that you consulted?

10 A Yes.

11 Q All right. And then, finally, Appendix C lists your
12 compensation; correct?

13 A Correct.

14 MS. RYAN: Your Honor, I just want to note that
15 Exhibit 120, as we're preparing to offer it, has been redacted
16 to comply with your *Daubert* order; so there's certain sections
17 that were deleted, and at the section headings were also
18 deleted.

19 THE COURT: All right.

20 Q (BY MS. RYAN) So what is the date of this report, Mr.
21 Torres?

22 A It's October 19, 2017.

23 Q Did you have some earlier versions of this report?

24 A Yes. There were, I think, two prior versions: One about
25 a year ago, in September, if I remember correctly; and earlier

1 in this year, in April or May.

2 Q Of 2016?

3 A April or May of 2017 there was an update with a full year
4 of 2016 included. And this includes information through
5 August 31 of 2017.

6 Q So the purpose of updating the report and issuing a
7 report in October was to bring the numbers current through
8 August 31, 2017; correct?

9 A Yes. And to comply with the order about striking some
10 sections.

11 Q Oh, correct. Right. Page 1 talks a little bit about
12 your assignment. Just generally, what were you asked to do?

13 A Well, generally as a damages expert, I was asked to
14 consider, assuming liability is proven at trial, what would
15 the infringement damages be according to what the law provides
16 and what the case law provides, and calculated in this case,
17 what would be the damages?

18 Q All right. So your review of the financial -- the tax
19 returns and the financial statements was part of that process
20 of determining --

21 A Yes. To determine those damages, then I have to look at
22 both businesses, and the financial and accounting records are
23 key. Tax returns are helpful, but they're very summarized.
24 So the accounting records, the operational records are
25 important.

1 Q They're helpful?

2 A Yes.

3 Q You must have them to do the report; correct?

4 A Yes.

5 Q Now, the background section of -- can you just
6 describe -- I'm on page 2 of the report. You just describe
7 the parties?

8 A Yes.

9 Q And you have examples of the two logos; correct?

10 A Yes.

11 Q And then you have some background information, and we're
12 hearing a lot of evidence today. I don't think we necessarily
13 need to go into that, okay?

14 A Right.

15 Q All right. And then several pages of redactions;
16 correct?

17 A Yes.

18 Q Starting on page 6 where you talk about the law and
19 economics of trademarks, I think the Court permitted this
20 section to remain in the report; correct?

21 A Yes.

22 Q And we looked very carefully; correct?

23 A Yes.

24 Q So it's just a general description of trademarks and --
25 well, you tell me what it is.

1 A Well, first to establish the general principles of what
2 trademarks represent from an economic perspective as business
3 assets. From a legal perspective, they are often protected by
4 registrations at the federal level; so they're considered
5 intellectual property in that sense. And there is a lot of
6 literature and colloquial, or informal, talking about
7 trademarks, combining the term "brand," "brand equity," and
8 "trademark." So I'm also discussing there how all of those
9 terms that are used in the financial and economic literature,
10 how did those relate to the concept of trademarks that is
11 being analyzed in this report.

12 Q Thank you. Then going over on to page 7, what is the
13 discussion here?

14 A Well, basically bringing it all together, there is
15 that -- the fact of the -- or the characteristic that
16 trademarks are used by businesses to attract customers because
17 customers create a connection between the trademark and what
18 they experience, the satisfaction of their needs or wants, and
19 trademark law protects those consumers in the sense of
20 enabling them to identify the source of their goods or
21 services that are being provided. That's the goal.

22 Q Okay. And it's important for the consumer to be able to
23 accurately identify the source?

24 A Yes.

25 Q Now, starting on page 8, there is a beginning of a

1 discussion about assessing damages, and then there's some
2 redactions; correct?

3 A Yes.

4 Q You do note that Lawn Managers acquired its reputation in
5 brand equity through its use over 35 years; correct?

6 A Correct.

7 Q And then on page 9 you go into a discussion of the lawn
8 care market?

9 A Yes.

10 Q And this is the section where you use Commerce Department
11 and census data; correct?

12 A Yes, to just establish a quantitative basis of what is
13 the size of the market, what are the general characteristics
14 of the market for these types of services.

15 Q And did you analyze that or find the data for that with
16 regard to Missouri?

17 A Oh, yes.

18 Q All right. And then did you also tie it to the 81 zip
19 codes that were divided up in the nonsolicitation and
20 noncompete agreements here?

21 A Correct.

22 Q So that's what's being refreshed at the bottom of page 9;
23 correct?

24 A Yes.

25 Q The 81 zip codes?

1 A Yes.

2 Q So you specifically linked that to the zip codes?

3 A Correct.

4 Q Now, in your deposition you were asked about various
5 municipalities and how they related to the zip codes. You're
6 not from St. Louis, are you?

7 A No.

8 Q So if I asked you where Ladue was and what its zip code
9 was, you wouldn't be able to tell me, would you?

10 A I only remember we passed it on the way from the airport.

11 Q Okay. Do you know the zip code for Ladue?

12 A No.

13 Q Thank you. So then beginning on page 10, you go into the
14 analysis of -- the profit analysis; correct?

15 A Yes.

16 Q And can you just briefly explain what you did here?

17 A Yes. Well, one of the categories of damages that the law
18 provides for in an infringement case and for trademarks is the
19 recovery of defendant's profits attributable to the
20 infringement.

21 So I looked in this case to the generation of profits
22 for Progressive Lawn Managers, Inc. and identified the
23 activities that occurred after January 2015 when, according to
24 the documentation, they should have stopped using "Lawn
25 Managers" as a trademark and then calculated first what are

1 the sales, because that is the plaintiff's burden to first
2 establish what the sales by the defendant were that were using
3 the trademark at issue.

4 Q All right. And by "sales," you mean the gross revenues
5 of the company?

6 A Yes. Yes.

7 Q And were you made aware of any other business activities
8 that Progressive Lawn Managers, Inc. conducts under any other
9 trademark?

10 A Well, my understanding was that there was no other
11 trademark being used, per se. There is also a distinction
12 between the name of the company and the trademark under which
13 you trade. So for example, from 2012 onwards the company
14 Progressive Lawn Managers, Inc. was created and awarded some
15 zip codes for a time and also the right to use -- to do
16 business as Lawn Managers for a limited time.

17 So those are two things. The right to be Progressive
18 Lawn Managers, Inc. is indefinite. It's not defined, but the
19 right to use the trademark "Lawn Managers" was defined as for
20 the next two years, roughly speaking.

21 Q And it had an end date?

22 A And it had a definite end date, yes.

23 Q And so that's why you started with January 12, 2015;
24 correct?

25 A Yes, because that's the definite date where the right to

1 use the trademark "Lawn Managers" ended. So according to the
2 documentation, that trademark was still being used. So if it
3 was still being used, it was being infringed. So the sales
4 were being generated on the basis of that trademark.

5 Q Thank you. And that actually is going to be the issue
6 for the Court to find; correct?

7 A Yes.

8 Q Whether it was infringed or not after January 1, 2015?

9 A Yes. To calculate the damages, I have to assume that
10 liability is found. Otherwise, the whole report is moot.

11 Q Thank you. Now, going into page 11, can you tell me what
12 the discussion on that page is?

13 A Well, first is that there is a direct nexus between the
14 use of the trademark and the generation of revenue or sales.
15 There may be situations where that isn't the case, but in this
16 particular industry in this particular case, it seems pretty
17 close that nexus between the sales and the use of the
18 trademark.

19 Q Let me just -- let me interrupt you just for a moment.
20 So if we had as an example of the use of a trademark where a
21 company might have multiple trademarks, it might be a company
22 that makes pet food, but they make dog food and they make cat
23 food and they have two different brands.

24 A Yes.

25 Q Correct?

1 A So there it's necessary to carve out exactly what sales
2 correspond to which infringed trademark. In some situations
3 the products could be very similar but sold under different
4 trademarks -- the same product.

5 So that was definitely not the case here, where all
6 of the sales are generated by the same type of activities, the
7 same -- under the same umbrella brand.

8 Q All right. And then tell us what Table 1 is on page 11.

9 A So Table 1 is the gross revenues by area and year from
10 the operational reports, from the reports that are generated
11 in the management of the company. It's not necessarily the
12 full accounting, just the operational side.

13 And it lists -- so I was able to segregate from the
14 total gross revenue for the years 2015, 2016 which revenue was
15 generated from the zip codes that were in the list of the
16 plaintiff's area, or Lawn Managers, Inc., and the revenue that
17 was generated from zip codes assigned to Progressive Lawn
18 Managers.

19 Q On my screen I can't really read those numbers, but it's
20 just under \$9,000 being generated in --

21 A Yes.

22 Q -- Lawn Managers' zip codes, but this is Progressive's
23 revenues; correct?

24 A Progressive's revenue from Lawn Managers, Inc. area were
25 8,964 in 2015 and 8,735 in 2016 through the end of July.

1 Q Now, you've also got figures for 2017 in this table?

2 A Yes. So the third page is the "all areas" line that
3 covers from August through December of 2016 and January
4 through the end of August for 2017.

5 Q Did you have a tax return for either party available to
6 you for 2017?

7 A No, because those are annual calendar year companies that
8 are using, you know, calendar year tax returns; so there's no
9 tax returns.

10 Q So they haven't filed yet for 2017; correct?

11 A No.

12 Q They can't do that until the year is over?

13 A They can't.

14 Q All right. And so this is showing gross revenue and --
15 correct?

16 A Yes.

17 Q And if we were to stop here -- you did further analysis,
18 but if we were to stop here, these would be gross revenues of
19 Progressive, and then it would be their burden -- under your
20 understanding, it would be their burden to prove the costs
21 that are to be deducted; correct?

22 A Correct.

23 Q Did you, however, go forward and do some additional
24 analysis?

25 A Yes. It's generally best practices not to presume that

1 all of the revenue is profit and anticipate the framework for
2 the deduction of the incremental costs that are associated
3 with those revenues specifically.

4 Q So what information did you look at to figure out what
5 the costs were?

6 A So for the costs I had to rely on the tax returns as
7 opposed to the operational returns because the operational
8 information does not have detailed costs or anything like
9 that. And for the years 2015 and 2016, because they're full
10 years, we do have the tax returns for the defendant.

11 And the criteria to select what costs are deductible
12 from revenue in order to find the profits derived from the
13 infringement involves going through the different cost
14 categories that are itemized in the tax return or in the
15 accounting records, if you're going through accounting
16 records, and consider whether or not that expense is not only
17 necessary for the operation but varies with the volume of
18 sales being done.

19 Q So let me interrupt you just for a moment. So does that
20 mean that certain costs that a business might have would
21 generally not be deducted from the gross revenue in this
22 analysis?

23 A For infringement analysis, that's correct. There's a
24 difference between what the incremental costs that are a
25 proper analysis for infringement from the accounting costs

1 that are proper from a generally accepted accounting
2 principles, or GAAP. There's slightly different rules for
3 certain deductions for tax purposes; so those may be three
4 different measures of profits for taxes, for financial
5 reporting, or for infringement analysis.

6 For example, for taxes it may be correct in tax
7 accounting to deduct charitable contributions, but it's not a
8 necessary expense from a financial perspective or from an
9 economic infringement perspective either.

10 Q In other words, because it's not tied to the generation
11 of the revenue?

12 A Right. Because it's really a disposition of profit.
13 That's where -- it's really profit that is being dedicated
14 outside of the company by a voluntary decision.

15 Q And are there other categories of expenses that are
16 similar to that? I've got this open to page 12 of your
17 report; correct?

18 A Twelve and 13 is the detailed table from the tax returns
19 and the accounting report through the end of August of 2017.
20 So the first category that is deductible in all three
21 methodologies is the cost of goods sold. There's --

22 Q That C-O-G-S?

23 A Yes. That's the common abbreviation for the COGS. And
24 that gives you a first level of profit that is often used, the
25 gross profit. And generally in financial accounting, gross

1 refers to revenue minus the cost of the goods sold.

2 Q Is salaries normally a part of cost of goods sold or --

3 A Well, depending on the specific company, it's more common
4 in manufacturing to include the wages of the direct labor to
5 be included in the cost of goods sold, but in services, in the
6 services industry, it's not as easily accounted for; so those
7 types of salaries or payroll costs are part of what are called
8 operational expenses. The operating expenses are listed after
9 the gross profit, and they're all types of costs that are
10 related to maintaining the operation of the company.

11 Q So looking at page 13, Table 2, have you come up with a
12 number for the -- basically the net revenues that would be
13 attributable to profits due to the infringement by defendant
14 here?

15 A Yes.

16 Q And what is that number?

17 A So the total number during the damages period is
18 \$320,446, and that's made up of the three numbers from the two
19 years that we have the tax returns and the one year where we
20 only have partial year information from the accounting report.

21 And so what is important is that from these itemized
22 cost deductions, I have not included those cost line items
23 that are not necessary for the operation of the company or
24 necessary to obtain the revenue and that are typically not
25 included in this type of infringement analysis.

1 And the concept is similar to the financial concept
2 of calculating earnings before interest, taxes, and
3 depreciation, and amortization because all those categories
4 reflect decisions and structures and factors that are either
5 voluntary, discretionary, or actually addressing profits.

6 So, for example, interest is not included. That's a
7 deduction for infringement analysis and for financial
8 reporting for the EBITDA level of profit because it depends on
9 the financial structure of the company, and that's a decision,
10 how much to do to finance it with debt, how much with equity.

11 Taxes are meant to be a portion of the profit; so we
12 don't do the taxes for financial reporting and for the
13 infringement analysis.

14 Depreciation and amortization have very specific
15 rules under tax reporting because they are used as incentives
16 for investment; so those are arbitrary numbers. From a
17 financial perspective, it's also arbitrary because it gives a
18 definite life to certain assets in which to recover the costs,
19 and it's not necessarily linked to the actual operation of the
20 company. So an asset depreciates regardless of whether it's
21 in use or not.

22 Q All right. So thank you. So setting aside some costs
23 that would be deducted on a tax return, for example, you've
24 kind of brought those back into the gross profit picture
25 because --

1 A Yes.

2 Q -- those other items are discretionary items and/or are
3 already in the profit number?

4 A Correct.

5 Q So when you said something about charitable donations as
6 an allocation of profit --

7 A Yes. So it's going to be a deduction from a tax
8 perspective, but it's not a proper deduction from revenue from
9 an infringement analysis perspective because economically it's
10 a disposition of profit. It's not a necessary expense in
11 order to generate the revenue.

12 Q Thank you. Now, did you also attempt to conduct
13 another -- a different analysis of damages? I'm looking at
14 the bottom of page 13.

15 A Yes. Well, as far as defendant's profits, because the
16 cost information is only available from the tax returns and
17 the tax returns give slightly different numbers for the
18 revenue than the actual operational reports -- not too
19 different, but it's slightly different -- I also applied the
20 average ratio between the defendant's incremental profits from
21 the period from infringement as a proportion of total revenue,
22 which is 15.8 percent, and applied that to the gross revenue
23 that I derived from the operational reports, and that's
24 basically the conclusion, the 322,753. It's slightly
25 different, but that's because of some accounting manipulations

1 that are done for tax returns.

2 Q So the bottom line is your calculation of defendant's
3 profits is this number or this number, which are very --
4 within \$2,500 of each other?

5 A Correct. This is a tax return number in the table
6 considering the tax returns and the accounting report directly
7 or using the same proportion the concluded value of 322 at the
8 end of the paragraph, which corresponds to the total revenue
9 from the operational reports.

10 Q Okay. And then shifting gears into plaintiff's lost
11 profits, were you asked to take a look at that? That's a
12 different category; correct?

13 A Yes. That's very different.

14 Q And starting at the bottom of page 13, you did attempt to
15 do an analysis there; correct?

16 A Yes.

17 Q And going over on to page 14, what did you find?

18 A Yes. So first the consideration is from what the
19 trademark law establishes is that the trademark owner can also
20 recover his or her lost profits. One would have to be in a
21 position to determine which customers would have gone to the
22 plaintiff but actually went to the defendant, and that is not
23 necessarily quantified in this particular case.

24 But what I was able to do is to calculate what the
25 profit margin would have been for a typical customer for the

1 plaintiff and estimate then how much profit was lost per
2 account that would have been in that situation. But I don't
3 have a precise estimate of how many accounts were in that
4 situation; so I only have a calculation per account.

5 Q And that's what's on page 15 of the report; correct?

6 A Yes.

7 Q And then at the bottom of 15, you begin a discussion of
8 corrective advertising?

9 A Yes. Another completely different category of damages
10 that in some cases is awarded is if it merits advising the
11 market participants of the infringement and of the distinction
12 between the trademarks. So in this case I calculated a
13 measure of what the cost of a prospective corrective
14 advertising campaign would be, which would be to mail, for
15 example, the cheapest type of post card flyer, which would
16 communicate to the households that are affected in the area
17 currently designated to the defendant -- well, designated to
18 the defendants during the period between 2012 and 2016 --
19 where that confusion may have been the highest. Although, of
20 course, people travel from -- to and from zip codes; so
21 they're exposed to both marks throughout the area.

22 But if a measure -- if a prudent measure of
23 mitigating the confusion is to correct the impression of the
24 people that live in those areas, then that campaign would have
25 to address 185,000 owner-occupied households which, according

1 to my analysis, was a reasonable estimate of the size of the
2 market.

3 And sending a mailer -- I priced what companies that
4 do that type of mailing. It's about 38 cents per address. So
5 they could do that mailing for \$71,346.

6 Q Thank you. And in your experience, if you know,
7 corrective advertising -- is that necessarily a negative
8 mailed piece about the defendant, or does it say anything
9 negative, or can it be a piece that says something, you know,
10 here we are; we have a new company; we've changed our name?

11 MR. KELLY: Your Honor, I would object to this line
12 of questioning. A, it's not disclosed, and, B, it's outside
13 his area of expertise.

14 MS. RYAN: Okay. That's fine. I'll withdraw the
15 question.

16 Q (BY MS. RYAN) Going into prejudgment interest, do you have
17 a discussion of whether that's been calculated or not?

18 A Well, I haven't calculated. Usually it's the Court may
19 want to have it calculated in certain circumstances. It's not
20 a big number in this case because there hasn't been that much
21 time or inflation; so the interest rates have been relatively
22 low. But if asked, I can calculate those interest that has
23 accumulated from the different time periods -- 2015, 2016, and
24 2017. And I just reference the Missouri Statutes if that is
25 what is available.

1 Q Thank you. And then going on to page 17, there's five
2 numbered paragraphs there. Are those -- is this your
3 conclusion?

4 A These are the summary of opinions.

5 Q And can you just briefly run through those?

6 A Yes. So first to establish infringing revenues from
7 January 1, 2015, through August 31, 2017, I found \$2,036,830.
8 Economic damages in the form of disgorgement of
9 defendant's profits for the same period, which would reflect
10 Progressive's estimated EBITDA margin of 15.8 percent, amount
11 to no less than \$322,753.

12 Then the economic damages in the form of lost profits
13 are quantifiable at a rate of no less than \$117.75 per new
14 account per year for infringements after July 25, 2016.

15 And the economic damages in the form of corrective
16 advertising are estimated at no less than \$71,346.

17 And, finally, if requested by the Court, I intend to
18 provide a calculation of prejudgment interest on the damages
19 award.

20 MS. RYAN: Thank you. Your Honor, I just would want
21 to, at this point, make sure that we have the tax returns and
22 financial statements that he relied upon in the record. I
23 think Exhibits 117, 118, and 119 have already been admitted.
24 I would like to offer, if there is no objection from Mr.
25 Kelly, Plaintiff's Exhibits -- or what's been marked as

1 Exhibit 74 to 77. Those are the Progressive tax returns for
2 2013 through 2016. And also Exhibit 116, which is
3 Progressive's interim financial statements through August 31
4 of 2017.

5 Exhibit 78, which is Progressive's balance sheet of
6 profit and loss statements for 2016 -- I think I have my dates
7 on my notes wrong. I think they're 2013 to 2016 on balance
8 sheets. So I would like to make sure those are all in the
9 record and make sure and offer them at this point.

10 MR. KELLY: No objection.

11 THE COURT: Let's see, 78, 116, 77, 76, 75, and 74
12 are admitted.

13 MS. RYAN: Thank you.

14 Q (BY MS. RYAN) Mr. Torres, have you had an opportunity to
15 review the reports -- well, first of all, let me ask you, you
16 have talked about --

17 MR. KELLY: Your Honor, I'm going to object if he's
18 going to rebut anything in Mr. Toennies' report. I've not
19 received a rebuttal report. There's been plenty of time.

20 THE COURT: You have a response?

21 MS. RYAN: Your Honor, our expert updated his report.
22 He provided me with a rebuttal last week, and I'm going to ask
23 Mr. Torres to talk about the rebuttal. I could have him wait
24 around and --

25 MR. KELLY: It says nothing.

1 MS. RYAN: -- observe the testimony.

2 THE COURT: It says nothing about Mr. Toennies in
3 this report.

4 MS. RYAN: Well, it couldn't because you hadn't
5 provided it yet.

6 MR. KELLY: Mr. Toennies testified and gave his
7 report last spring. There's never been a rebuttal report
8 about his methodology, assumptions, analysis, conclusions, or
9 calculations. This is the first time I'm hearing rebuttal.

10 THE COURT: Well, it is typical for experts to be in
11 the courtroom. I will allow this witness to remain in the
12 courtroom during the testimony of the defendant's expert and
13 then to be re-called, and I will take up further objections at
14 that time.

15 MS. RYAN: That will be fine. Then I think I have no
16 further questions at this point, Your Honor. I would like to
17 go ahead and offer Plaintiff's Exhibit 120, which is the
18 redacted expert's report dated October 19, 2017.

19 THE COURT: Any objection to Exhibit 120?

20 MR. KELLY: No, Your Honor.

21 THE COURT: All right. It will be received. And
22 117, 118, and 119, I think, have been indicated as being
23 previously offered and received. I do see that. Okay.

24 MS. RYAN: Thank you.

25 THE COURT: Okay. Anything further?

1 MS. RYAN: No.

2 THE COURT: All right. Cross-examination. We'll go
3 till about 12:15, and then we'll resume at two o'clock.

4 **CROSS-EXAMINATION**

5 **BY MR. KELLY:**

6 Q Mr. Torres, you are not an accountant?

7 A No.

8 Q And you are not authorized by any government body to
9 prepare tax returns on behalf of any third party?

10 A No.

11 Q In furtherance of preparing your report, did you do any
12 surveys?

13 A Surveys, no.

14 Q You did not speak to any customers?

15 A No.

16 Q You didn't speak to the principals or employees of any of
17 the parties?

18 A No.

19 Q Did you speak to any lawn care providers in the St. Louis
20 area to determine what factors drive lawn care business?

21 A No.

22 Q And did you speak to any lawn care providers to determine
23 how business for a St. Louis area lawn business fluctuates
24 during the year?

25 A No.

1 Q You didn't bother doing any type of analysis as to the
2 recognition of Lawn Managers by any population demographic
3 either before or after 2012?

4 A You mean a survey?

5 Q Well, you didn't try to do anything to determine its
6 public recognition at any time, did you?

7 A No. That was not my task, no.

8 Q Never tried to assess the strength of its brand?

9 A Tried to --

10 Q Assess the strength of its brand?

11 A No.

12 Q Did you determine how long any of the logos the plaintiff
13 has been using were used?

14 A In my -- for my initial report I did some research on
15 past and current, at the time, usage of logos.

16 Q Is that factors -- I'm sorry.

17 A But that portion was stricken from my report.

18 Q So you haven't factored into how long Lawn Managers has
19 used any particular logos it has in your calculations?

20 A For the calculation of revenue, I didn't have to do a
21 time line of the different logos of the different companies.

22 Q So I'm just asking if it did do a logo change, your
23 calculations don't assess whether it was good or bad for
24 plaintiff?

25 A Right. I'm not evaluating the performance of the

1 companies.

2 Q You said there was a clear nexus between use of the
3 market and revenues. Can you cite to me any specific customer
4 that purchased services from the defendant because of her --
5 the use of an infringing mark?

6 A The nexus is between the use of the mark and the revenue
7 generation. There is a general linkage because it was a
8 specific -- I mean, which is evidenced for my perspective as
9 an economist, it's evidence in the fact that Progressive
10 insisted on using "Lawn Managers" not only at the beginning
11 two years, when it launched, but also has been using it
12 prominently, you know, up to the point where I did my last
13 review in 2017.

14 So the fact that they see it as an important
15 trademark to use was evidence for me as an economist that
16 that's how they viewed the mark in the market. And their only
17 product or service -- or all their services are marketed under
18 that trademark. There is no distinction of different services
19 branded different names or different sub brands. So all of
20 the revenue generated by the services are generated under that
21 brand.

22 Q And can you cite me any customer that purchased services
23 from the defendant because it used an infringing mark?

24 A No. That is not part of the analysis that is needed.

25 Q And do you know what brands that Progressive used on its

1 trucks?

2 A I don't understand the question.

3 Q Are you aware of what brands it used on its trucks?

4 A I'm aware that it used signage on the trucks stating the
5 name of the company, the full name of the company, or
6 sometimes the logo, the stylized logo, that includes the Arch
7 in a circle with "Progressive" underneath and "Lawn Managers"
8 highlighted across the banner.

9 Q So is it your assumption that all signage used by the
10 defendant is infringing?

11 A My perspective -- and I'm not testifying as to
12 liability -- is that all use of the term "Lawn Managers" that
13 is highlighted in the marketing communication, that is an
14 infringing use if it's done after January 1 of 2015.

15 Q And I'm not sure that answered my question. I'm just
16 saying are you assuming that all usage, all signage used by my
17 client is infringing? That's all I'm asking. Is that what
18 you're assuming?

19 A No. I'm assuming liability. So I am assuming that the
20 use of the Lawn Managers' trademark since January 1, 2015,
21 onwards would be infringing.

22 Q So did you take into account whether there were any other
23 usages of signage or postings that were not infringing?

24 A Up to the point of when I did the last of the report, I
25 haven't seen any updated logo from Progressive that did not

1 use "Lawn Managers" in a prominent manner.

2 Q Have you seen any photographs of Progressive trucks going
3 back to 2013?

4 A Not as part of my report.

5 Q So your report does not try to assess what revenues of
6 Progressive were due to legal prominent use of its marks?

7 A No. Again, I have to assume liability.

8 Q Did you account in your opinions for the fact that there
9 might be references to Lawn Managers on third-party sites not
10 controlled by Progressive?

11 A I did not do a -- my task is not to do a survey of
12 websites or anything like that. I analyze revenues from
13 Progressive.

14 Q And did you ever analyze the effect on the marketplace of
15 defendant's use or right to use the words "Lawn Managers"
16 alone during the period May 12 through December 31, 2014?

17 A Again, I have to assume liability in order to calculate
18 damages. That is a period before the infringing use.

19 Q So you did not do that analysis?

20 A That's what I'm saying.

21 Q And you agree that the information available is not
22 sufficient to differentiate the effects of confusion that
23 would have been created before or after January 1, 2015?

24 A Correct. The financial information that Progressive
25 provided does not allow for that.

1 Q And you haven't tried to assess what confusion in the
2 marketplace is attributable to conduct of Progressive that was
3 in compliance with the divorce orders?

4 A Again, I'm not analyzing liability or doing surveys of
5 use before January 1, 2015; so that's not even relevant to
6 what I did.

7 Q I'm not limiting it to before 2015. I'm just asking if
8 you tried to assess what confusion in the marketplace or
9 revenues of defendant were attributable to conduct that was
10 incompliant with the divorce decree?

11 A That compliance would have been before January 1, 2015 --

12 Q Wasn't the company allowed to use the name "Lawn
13 Managers" afterwards?

14 A The name of the company, yes, but not the trademark "Lawn
15 Managers."

16 Q Right. And the name "Progressive Lawn Managers" fully
17 incorporates the words "Lawn Managers"; correct?

18 A It incorporates the words, yes.

19 Q I asked you about a customer -- customers that plaintiffs
20 may have gotten, but you could not identify one customer that
21 you believe plaintiff lost to defendant for any infringing
22 acts; is that right?

23 A That's what I say in my report.

24 Q And in calculating Progressive's profits, you included in
25 Progressive's revenues, revenues derived from residential

1 customers that were zip codes awarded to Mrs. Smith; correct?

2 A Yes.

3 Q And more specifically, sir, in calculating Progressive's
4 profits, you included in Progressive's revenues, revenues
5 derived from residential customers for which Mrs. Smith was
6 awarded all right, title, and interest by the Circuit Court of
7 Jefferson County; is that correct?

8 A For the years 2015 and 2016, for example, those revenues
9 from those zip codes would still be infringing if they used
10 the trademark "Lawn Managers." The right to market to
11 specific zip codes is separate from the analysis that has to
12 be done in terms of the use of the trademark.

13 Q Thank you, sir. I was just asking did you include in
14 your calculations Progressive's revenues from residential
15 customers that were specifically awarded to Ms. Smith in the
16 divorce decree?

17 A If there were any -- any revenues generated from 2015
18 under that trademark would have been infringing; so I included
19 it.

20 Q And even though they may have been customers going back
21 to 2012.

22 A Yes.

23 Q You referenced Department of Commerce data and the 1,877
24 establishments providing landscaping services over the past
25 five years. Do you recall that?

1 A Yes.

2 Q And you can't tell where any of those establishments
3 provided landscaping services in the past five years, can you?

4 A Not off the top of my head, but I have the report.

5 Q And you said that data applies to landscaping businesses;
6 correct?

7 A Lawn care is what I searched for.

8 Q Well, I believe your report says "landscaping."

9 A There are statistics for two things that are different
10 sources. You may be confusing those. The U.S. Census Bureau
11 in the Economic Census section uses the term "landscape
12 services" as a general term. I also did a -- and that only
13 serves to calculate the number of owner-occupied units to
14 estimate the size of the market, but that is not part of the
15 calculation of revenue.

16 Q So you used data --

17 A There is another source that I cite in the report, that
18 is, the Better Business Bureau, where there I searched for
19 lawn care company, and that is also cited in the report, but
20 that is also only as a reference to the broad strokes of the
21 market as a framework, not a part of the calculation.

22 Q So getting back to my question, your report on page 9
23 references you used census data attributable to landscaping
24 services; correct? Second to last paragraph.

25 A Well, it doesn't say that I used it.

1 Q You said it refers to.

2 A I'm just reporting what the latest economic census says.

3 Q Was it important to your report or not?

4 A As a frame of reference. It's not part of the
5 calculation.

6 Q Well, could you use the 1,877 for anything?

7 A No.

8 Q But you used the data. Now, which of these --

9 A No.

10 Q -- which of these parties --

11 A No. There's no other data.

12 Q Which of these parties is a landscaping business?

13 A There's no other data that I used.

14 Q That didn't answer my question. Which of these parties
15 are landscaping businesses?

16 A Oh, the parties of the case?

17 Q Yes.

18 A None of them.

19 Q And there's nothing in that Department of Commerce data
20 in your report that indicates which companies provide only
21 residential, commercial, or both services, is there?

22 A No. That's why I didn't use the information.

23 Q Now, you looked at census data; correct?

24 A Economic census data, yes.

25 Q Yes. And what was the census data you used?

1 A I looked at the economic census data that -- that's the
2 latest data that is published is for the year 2012.

3 Q And that told us the number of owner-occupied residential
4 units?

5 A It -- excuse me. That was 2014. And that's for the
6 owner-occupied units, yes.

7 Q Right. How many of those are apartments?

8 A As I say in the report, you can't tell from the report,
9 from the census, whether these are -- if some of them may be
10 condominiums that would be owner-occupied units in apartments.

11 Q Can you tell us how many are condominium owners,
12 duplexes, or single-family homes?

13 A So that's what I'm saying.

14 Q You can't tell?

15 A The census information does not have that distinction.
16 That's why it's -- I'm considering the statistic as a proxy.
17 I'm not offering it as an absolute number. It's Footnote 35.

18 Q Can you turn to page 9 of your report, please.

19 A Yes.

20 Q Can you read the last sentence?

21 A According to census data, Footnote 34, at the end of
22 2014, there were a total of 517,493 owner-occupied residential
23 units, OOU's, in the 81 zip codes in which the area was divided
24 between the parties.

25 Q And what division are you talking about?

1 A I think that's for the total, both.

2 Q The division?

3 A The sum of the two.

4 Q The divorce in 2012?

5 A Well, divided between the parties, yes.

6 Q Right. You're not referring to some other division.

7 You're talking about the division of --

8 A Of course.

9 Q -- zip codes between the parties in 2012; is that right?

10 A Yes.

11 Q Okay. I just wanted to be sure. And how many zip codes
12 did Ms. Smith get?

13 A I don't recall. I have it in my Exhibit 1.

14 Q Would you agree she got 19? Do you know?

15 A I don't want to commit to a number. I don't recall.

16 Q So if Ms. Smith got 19 and Mr. Zweifel got 52, how many
17 would that leave? Seventy-one, wouldn't it?

18 A Okay.

19 Q Not 81; correct?

20 A I'm not sure if you're referring to the fact that
21 there's -- there may be an error. But that's just recounting
22 what is available in the economic census, which is not part of
23 the information used in the report.

24 Q You can't tell from the census data what percentage of
25 residential homes actually use a lawn care service, can you?

1 A Not from the census data, no. I didn't say that.

2 Q And you can't tell from that data for the residential
3 homes in those zip codes that do purchase lawn services what
4 type of lawn services they purchase?

5 A Again, that's a subset of the prior question; so the same
6 answer of no.

7 Q You don't know what percentage of homes in the zip codes
8 that plaintiff was awarded use lawn care services, do you?

9 A Again, no.

10 Q And you have the same answer for the zip codes for
11 defendant?

12 A Yeah.

13 Q Now, in the United States we don't pay taxes on EBITDA;
14 is that correct?

15 A That's correct.

16 Q You mentioned charitable deductions.

17 A Yes.

18 Q Companies can make charitable payments for reasons of
19 goodwill; correct?

20 A For many different reasons, yes.

21 Q And one of those is goodwill?

22 A I don't know what definition of that term you're using.

23 Q Could you look at page 13 of your report, please.

24 A Yes.

25 Q Now, I'd like you to look at Table 2 on that report.

1 THE COURT: I think this is probably going to take a
2 little bit; so we're going to recess at this time until two
3 o'clock. Thank you very much.

4 **(COURT RECESSED FOR LUNCH FROM 12:12 PM UNTIL 2:10 PM.)**

5 THE COURT: You may continue.

6 MS. RYAN: Your Honor, could I just interrupt with a
7 housekeeping matter real quick? We were trying to figure out
8 whether Exhibits 91 and 158 have been admitted.

9 THE COURT: Oh, 91?

10 MS. RYAN: Yes. And 91 is the written record of the
11 phone call about the Scion, the erratic driving. And 158.

12 THE COURT: I show 91 being admitted.

13 MS. RYAN: 158 is the blue sign.

14 THE COURT: You show 158, Ms. Stamm?

15 THE CLERK: It was objected to and overruled, but I
16 didn't write "admitted."

17 THE COURT: I have it identified, objected to, but I
18 don't think it has been admitted.

19 MS. RYAN: I would like to go ahead and offer
20 Plaintiff's Exhibit 158 into evidence.

21 MR. KELLY: Over my objection, I guess, Your Honor.

22 THE COURT: And your objection again is what?

23 MR. KELLY: It hadn't been produced before today. It
24 was the first time I've seen it.

25 THE COURT: Then I'll sustain the objection.

1 MS. RYAN: Thank you.

2 THE COURT: All right.

3 Q (BY MR. KELLY) Mr. Torres, you can't state for any year
4 2015, 2016, or 2017 how much of defendant's revenue was from
5 customers awarded Ms. Smith in the divorce orders of 2012 or
6 2014; is that correct?

7 A It's not segregated in those terms, no.

8 Q And in calculating the defendant's profits, you only used
9 the incremental cost per services; is that right?

10 A The incremental costs in the company, yes.

11 Q You didn't use all overhead costs; correct?

12 A All overhead costs in the sense of financial accounting,
13 no.

14 Q And in calculating tax liability, a company isn't limited
15 to only deducting incremental cost; is that correct?

16 A No. The incremental cost is completely different from a
17 tax return cost allowance.

18 Q So the answer would be yes, the company is not limited to
19 just simply just deducting incremental cost? I just want to
20 make sure I got a clear answer.

21 A Okay. Yes.

22 Q You've reviewed the tax returns of the defendant in this
23 case; is that correct?

24 A Yes.

25 Q And I believe that you have them before you as

1 Plaintiff's Exhibit 112. Could you please open those up.

2 MS. RYAN: Actually, 74 to 77, actually.

3 A Yeah.

4 Q All right. Let's use 74 to 77. Can you tell the Court
5 what the gross revenues for Progressive were in 2013?

6 A Gross revenue in the tax return is \$784,887 for 2013.

7 Q 2013?

8 A Uh-huh.

9 Q Thank you. And for 2014?

10 A That would be in another exhibit. This one only has --

11 Q Oh, yes. This would be the next one after --

12 A Not that one. I don't see tax returns in the next
13 exhibit.

14 Q This will speed things up. Is 75 not in your book?

15 A This was 112.

16 Q No, no, no. It's 74, 75, 76, and 77, sir. Here, use
17 those. Maybe that will speed things up. Is that easier?
18 Okay. There.

19 A Okay. Sir, if you can repeat the question.

20 Q Yes, sir. What were the gross revenues for 2014?

21 A 2014, \$714,271.

22 Q And for 2015 what were the gross revenues?

23 A \$764,567.

24 Q And for 2016?

25 A \$693,583.

1 Q So there was drop of about \$70,000 from 2015 to 2016; is
2 that right?

3 A Roughly.

4 Q Did you make any inquiry as to what the source of that
5 drop was?

6 MS. RYAN: Your Honor, I'm going to object on the
7 relevance on this question.

8 A No.

9 THE COURT: If he can answer, I will overrule the
10 objection.

11 Q I think he answered "no." Is that correct?

12 A Correct.

13 Q Sir, I'm going to hand you what's been marked as Exhibit
14 0-3, which is a copy of your report from May 2017. Does that
15 look like a copy of your report, sir?

16 A Yes.

17 Q And would you turn to page 16, please.

18 A Page 16?

19 Q Page 16, yes, sir.

20 A Uh-huh.

21 Q Do you see that?

22 A Yes.

23 Q And in Item No. 2, in summary of opinions, you opined
24 that Progressive's profits were \$186,423; is that right?

25 A For the period January 1, 2015, through December 31,

1 2016.

2 Q Correct. For two years; is that right?

3 A Yes.

4 Q And in your current report, your opinion is that through
5 October -- or excuse me, August, Progressive's profits are
6 \$322,753?

7 A Yes.

8 Q So according to my math, that's a -- Progressive made
9 profits so far this year of \$136,330; is that right?

10 A So the difference between those two numbers is that, yes.

11 Q Okay. Now, what kind of accounting does Progressive do?

12 A In what sense?

13 Q Is it a cash basis or accrual basis?

14 A No. They use a mixture, a mixed, accrual and cash.

15 Q Are you sure about that?

16 A Well, that's what they declare in the tax returns.

17 Q Now, do you know how they source the -- I mean they
18 record their revenues?

19 A I would say yes.

20 Q Do you know -- do revenues for a business like
21 Progressive, are they front-loaded in any particular calendar
22 year, or are they balanced and steady over the course of the
23 year?

24 A No. They fluctuate particularly because the requirements
25 of the seasons are different.

1 Q And what kind of revenue can Progressive expect for the
2 rest of the year?

3 A Of what year?

4 Q This year.

5 A It would have to say that it's proportional to the last
6 four months of the year of the year of each of the previous
7 years. I mean, it's a regular --

8 Q Right. You have to look at the previous years to get an
9 idea of what goes on throughout the calendar year; correct?

10 A To project forward, yes.

11 Q So according to you, Progressive had almost as much
12 profits in eight months as it did in two years?

13 A Not according to me. According to the accounting records
14 provided by Progressive for the first seven months.

15 Q As you interpret them?

16 A Eight months.

17 Q Is that right?

18 A As the numbers there are stating.

19 Q Do they have a figure for incremental profit?

20 A No. But the numbers from the analysis of that
21 information, that's the number.

22 Q Would you look at Table 2 of your May 8, 2017, report.

23 THE COURT: Can I ask you what number that is again?

24 MR. KELLY: Yes, Your Honor. It's 0-3.

25 THE COURT: Oh three. Plaintiff's 0-3.

1 MR. KELLY: Defendant's 0-3. We got stuck with
2 letters.

3 THE COURT: Oh, zero three.

4 MR. KELLY: Yes. And next time, Your Honor, I'm
5 going to ask the Court's indulgence to be Defendant 1, 2, 3,
6 4.

7 MS. RYAN: Your Honor, it's the same as Plaintiff's
8 80, if that helps you.

9 THE COURT: Same as Plaintiff's 87?

10 MS. RYAN: Eighty, eight zero.

11 Q (BY MR. KELLY) It's page 13 of your May 2017 report. Do
12 you see that, sir?

13 A Yes.

14 Q All right. Now -- and, Your Honor, maybe if I put it on
15 the ELMO, it will be easier.

16 In this report you've got your calculations and
17 you've got the EBITDA right there; is that right?

18 A Yes.

19 Q You put that in the report, and now if we look at your
20 report from two weeks ago, you've got a new item there called
21 "incremental profit"?

22 A Yes.

23 Q So you changed the terminology?

24 A I did, yes.

25 Q And this incremental profit -- strike that. Why did you

1 make the change, sir?

2 A Because I saw that defense's expert had thoroughly
3 confused the issue. For infringement damages, one calculates
4 incremental costs and incremental profit, and he was trying to
5 discuss the determination of EBITDA as a general accounting
6 concept.

7 Q Did you point out in your report anywhere where Mr.
8 Toennies, the accountant, made any kind of error or mistake in
9 his calculations?

10 A My report does not address a rebuttal of his report.

11 Q But you changed your terminology in your table, and
12 that's Table 2; correct?

13 A Yes.

14 Q And that's an important table in your report?

15 A Well, the numbers are important. The table is --

16 Q Right. So that's an important table --

17 A It's a vehicle.

18 Q So you just, without indication or notice, you changed
19 the terminology of the final number to try to rebut Mr.
20 Toennies; is that right?

21 A No. I was trying to make it clear for him.

22 Q All right. Now, let me ask you to turn to Table 1 of
23 your report.

24 THE COURT: The current or --

25 MR. KELLY: Yes, May of 2017.

1 A Yes.

2 Q And there we have in Table 1, you've got figures for
3 2015; correct?

4 A Yes.

5 Q And now when we look at Table 1 in your October 19
6 report, you have different numbers for 2015?

7 A Yes.

8 Q Is that true? So you changed the numbers for 2015?

9 A I made the correction, yes.

10 Q Did you actually point out in the report anywhere that
11 you were making a correction?

12 A In the text of the report?

13 Q Yes, sir.

14 A No. I think we communicated with your office, stating a
15 detailed tracking of all the changes that occurred to
16 facilitate the comparison.

17 Q And that was after I said there were changes made to this
18 report that went beyond just merely updating; correct?

19 A That was when the final updated report was submitted.

20 Q All right. You submitted a first report a few days
21 earlier without any notification of what the changes were;
22 right?

23 A And you complained about it; so we complied by stating
24 every single difference, commas, et cetera.

25 Q Next to you, you have a notebook, a black notebook, right

1 on your left. Nope. Further left. About nine o'clock, right
2 in front of you. Yep, right there.

3 And there should be one for Your Honor right there.

4 You found the book?

5 A This book?

6 Q Yes.

7 A Yes.

8 Q Can you turn to Exhibit N-3, which, for the record, is
9 the expert's May 27, 2016, report.

10 A Okay.

11 Q Do you recognize the exhibit as such?

12 A N-3 is my report of May 27, 2016.

13 Q Thank you. Would you turn to page 13, please.

14 MS. RYAN: Don, hold on just a moment. This report
15 was provided a couple of days prior to a mediation between the
16 parties which occurred on June 1, 2016. I don't know that
17 it's appropriate to inquire into it as if it was produced for
18 litigation when it was actually provided in the course of the
19 mediation. I handed it to Mr. Kelly during the mediation. I
20 really think this should not come in, Your Honor.

21 MR. KELLY: Yeah. Actually, it's referenced in your
22 discovery responses. It says "please see report provided
23 previously." It was produced to us in discovery.

24 THE COURT: I'm going to overrule the objection for
25 the reason that, I mean, the information in the mediation

1 proceeding would be expected to be just as valid as in this
2 proceeding, and so I'm going to overrule the objection.

3 Q (BY MR. KELLY) All right. Are you looking at page 13,
4 sir?

5 A Yes.

6 Q And there's your summary of opinions?

7 A Yes.

8 Q And Item No. 2 you indicate the defendant had wrongful
9 profits of \$478,332; is that correct?

10 A For the period January 1, 2015, through May 31, 2016,
11 based on an industry estimated profit margin of 15 percent,
12 yes.

13 Q What financial records of the defendant did you look at
14 to get to that figure?

15 A I have to go back here. I did not have tax returns or
16 anything from the defendant for that -- at that point. I made
17 an estimate of the number of accounts and the annual revenue
18 based on information that I got from the census then and the
19 disclosures from the plaintiff.

20 Q And what disclosures does your report indicate you
21 received from plaintiff?

22 A The zip code breakdown information about the -- I think
23 the specific information was about a number of accounts and
24 the value per account and that the amount that was paid in
25 court or as a result of some court proceeding paying for a

1 number of accounts.

2 Q You think?

3 A Well, that's what I remember from, from a year and a half
4 ago.

5 Q Right. Because it doesn't indicate in your report, does
6 it?

7 A Right, because this was an estimate. It's titled
8 "preliminary damages summary." It's not entitled "damages
9 report," because at the time, in the process of the settlement
10 negotiations, this was the information that was available.
11 Discovery had not proceeded to the point where defendant had
12 provided actual information; so it wasn't available to be
13 analyzed.

14 Q And none of that was a barrier to you giving an opinion?

15 A The lack of information requires an estimate to be
16 produced, and that's what the preliminary summary discloses:
17 What estimates I can make at this point in discovery at that
18 time, a year and a half ago.

19 Q And I take it from your answer you didn't even look at
20 the plaintiff's financial records to render that calculation?

21 A To render an opinion on defendant's profits, I didn't
22 have to look at plaintiff's profit, correct.

23 Q Now, in your current report from October 2017, you have a
24 figure for corrective advertising; is that correct?

25 A Yes.

1 Q Have you seen any of the plaintiff's expenses from
2 mailing?

3 A No. I don't recall seeing that specific breakout from
4 the financials that I saw.

5 Q And did you ask for their actual expenses for mailing
6 items?

7 A Well, I asked for the financial information, and I got
8 the accounting information detailed -- I don't know that it --
9 there is an account for mailing, per se. I think there is
10 advertising, marketing. There may be postage as a separate
11 line item. I think they do have an account for that. But
12 it's not the whole thing. So I didn't see a report on
13 marketing expenses.

14 Q And your idea is that a mailer would be appropriate? A
15 card being mailed would be appropriate for corrective
16 advertising; is that right?

17 A Correct. From my experience, that is one solution that
18 has been adopted. In other situations, for example, among
19 online businesses, it's a notice in the online webpage that is
20 sufficient or in the video, et cetera.

21 Q Now, you used information to come up with that corrective
22 advertising number; correct?

23 A Yes.

24 Q And one of those numbers was a number of households?

25 A Yes.

1 Q What was it, 185,315? Is that correct?

2 A Yes.

3 Q You do not know how many of those households that you say
4 needs a flyer had ever seen anything with defendant's name or
5 mark on it; correct?

6 A No. I'm not claiming that; so it's correct.

7 Q You cannot say how many of those households have ever
8 used defendant's services since January 1, 2015?

9 A No.

10 Q In fact, you can't say how many of those households have
11 ever even used a lawn care service since January 1, 2015?

12 A Correct. For the calculation of corrective advertising
13 in a prospective method, no.

14 Q How many of those households even have a yard?

15 A It's not known from the census information.

16 Q How many of those may have received a mailer from
17 plaintiff in the past?

18 A It's not known.

19 Q And it's not known how many would have received a mailer
20 from defendant?

21 A Correct.

22 Q And there's nothing in your report that indicates if such
23 a mailer were sent how many people would actually read the
24 mailer; is that right?

25 A I'm not claiming that at all, no.

1 Q To your knowledge, has defendant corrected any of its
2 advertising over the last year?

3 A I understand that very lately, I would say in the last
4 month, some changes to the logos have been made and where
5 "Lawn Managers" is not used prominently or as prominently as
6 it was before.

7 Q And is that the limit of your understanding?

8 A Yes.

9 MR. KELLY: Thank you. I don't have any further
10 questions, Your Honor.

11 THE COURT: All right. Redirect.

12 **REDIRECT EXAMINATION**

13 **BY MS. RYAN:**

14 Q Mr. Torres, what is the purpose of corrective
15 advertising?

16 A Well, it's a category of the remedies of damages
17 available to the trademark owner to calculate in a prospective
18 manner, as I'm doing here, what it would take to redress the
19 wrong impression that has been generated in the market in
20 which the trademark operates.

21 Q Were you present in the courtroom when testimony was
22 offered about the number of yard signs that are used by both
23 parties?

24 A Yes.

25 Q And did you hear the testimony about the number of

1 impressions that the public may have gotten from driving by
2 the yard signs in yards for either party?

3 A Yes.

4 Q So it's many thousands of impressions; correct?

5 A Sure. Anything that is facing the street is likely to
6 get a lot of impressions.

7 Q Okay. So if Progressive had 1,500 customers times 7
8 treatments --

9 MR. KELLY: Your Honor, I'll object. This isn't
10 in -- this is not even rebuttal.

11 THE COURT: Let me take a look. No. I'm going to
12 overrule the objection. You went into the information about
13 the numbers of households and the need for, or not, for
14 mailing a card and such. I'll overrule the objection.

15 MS. RYAN: Thank you.

16 Q (BY MS. RYAN) So I think I was in the middle of a
17 question. If it was 1,500 customers, 7 treatments, 6
18 treatments, whatever, say 9,000 signs --

19 A Right.

20 Q -- times however many drive by that sign before it's
21 taken down?

22 A Correct.

23 Q Correct. Okay. So many thousands of impressions?

24 A Yes.

25 Q This is a per year sort of a figure?

1 A Yes. And it would vary, of course, by location. One
2 would take into account the presence of the vans while they're
3 stationary and moving. All that would be generating
4 impressions in that sense.

5 Q As well as the signage on the building?

6 A Yes.

7 MS. RYAN: Thank you. I have nothing further, Your
8 Honor.

9 THE COURT: All right.

10 MR. KELLY: Just a few, Your Honor.

11 **RECROSS-EXAMINATION**

12 **BY MR. KELLY:**

13 Q Mr. Torres, did you ask for information regarding the
14 number of the yard signs that defendant had used?

15 A Not specifically that, no.

16 Q Not specifically. Did you ask at all?

17 A I asked about the financial records including
18 advertising, marketing, yes.

19 Q Did you ask about the number of yard signs that were
20 populating the number of the residences?

21 A As I said, I did not ask specifically for the number of
22 yards signs.

23 Q Did you ask for any kind of data or metric on people who
24 may have seen this sign out front of Progressive's building?

25 A No.

1 MR. KELLY: Thank you. No further questions.

2 THE COURT: All right. You may step down. Thank
3 you.

4 MS. RYAN: Your Honor, I would like to call Linda
5 Smith.

6 THE COURT: All right. Step up and be sworn, please.

7 MR. KELLY: Your Honor, can my client go to the
8 bathroom first?

9 THE COURT: We will take a ten-minute recess.

10 **(COURT RECESSED FROM 2:39 PM UNTIL 2:59 PM.)**

11 THE COURT: Step up and be sworn, please.

12 **(WITNESS SWORN BY THE CLERK.)**

13 THE COURT: You may proceed.

14 **LINDA SMITH,**

15 **HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS**
16 **FOLLOWS:**

17 **DIRECT EXAMINATION**

18 **BY MS. RYAN:**

19 Q Would you please state your name for the record.

20 A Linda Smith.

21 Q Ms. Smith, are you the owner of all the stock of
22 Progressive Lawn Managers, Inc.?

23 A Yes.

24 Q And you've been the owner since the company was formed;
25 correct?

1 A Yes.

2 Q What year was it formed?

3 A 2012.

4 THE COURT: Just one second.

5 Q (BY MS. RYAN) The company was formed in 2012?

6 A Yes.

7 Q Were you present in the courtroom earlier today when the
8 video was shown?

9 A Yes.

10 Q Doesn't the video say that you've been in business for 24
11 years?

12 A Yes.

13 Q And says you have more than 20 employees?

14 A Yes.

15 Q Have you ever had more than 20 employees?

16 A In my 24 years' experience, we've had more than 20.

17 Q How long has your company been in business?

18 A Since 2012.

19 Q How many employees do you have right now?

20 A Nine.

21 Q How many employees did you have in 2016, total?

22 A Anywhere from nine to ten. It fluctuates. Sometimes 11,
23 sometimes 12.

24 Q How many -- have you ever had more than ten employees?

25 A We hire seasonal work; so I would have to look back at

1 the previous years to see who we hired on. We tend to hire
2 two to three people in the fall for seeding.

3 Q Are they all W-2 employees?

4 A Yes.

5 Q Please turn to Exhibit 111. Do you have that in front of
6 you?

7 A Yes.

8 Q Is that your federal payroll filing records?

9 A I'm sorry?

10 Q Take a good look at it. Is it the payroll filing records
11 for Progressive?

12 A It looks like W-2s.

13 Q W-2s for 2012. Go ahead and take the time to look
14 through it, please.

15 A Yes. I don't see '17.

16 Q Do you see the --

17 A Oh. Yes.

18 Q Okay. So these are your records; correct? Copies of
19 your records?

20 A Correct.

21 Q And is that showing that you ever had more than 16
22 employees in a year?

23 A I have not said that I had 16 employees in a year.

24 MS. RYAN: Okay. Your Honor, I would like permission
25 to play the video one more time.

1 THE COURT: No.

2 MS. RYAN: No?

3 THE COURT: No.

4 Q (BY MS. RYAN) Doesn't that video say that you've been in
5 business for more than -- for 24 years and you have more than
6 20 employees?

7 A It says I've been in business for 24 years, and it says
8 I've -- I have had up to 20 employees, I believe it says.

9 Q No. It says more than 20 employees, more than 20
10 professionally trained employees is what it says.

11 A Okay.

12 THE COURT: Now, rather than you testifying and the
13 witness being unclear, go ahead and play the video.

14 MS. RYAN: It's in evidence. Okay.

15 (VIDEO PLAYED.)

16 Q (BY MS. RYAN) So it says you had more than 20
17 professionally trained employees; correct?

18 A Yes.

19 Q So that's not true now, and it has never been true;
20 correct?

21 A It was true when I owned Lawn Managers.

22 Q Was it ever true of Progressive Lawn Managers?

23 A We've never had 20 employees.

24 Q So it's never been true for Progressive Lawn Managers?

25 A Not for Progressive.

1 Q But this video has been on your website for a number of
2 years; correct?

3 A I'm not sure when that video was put on my website.

4 Q Well, do you want me to pull it up? It says "Hibu 2013."

5 A It may have been on a different forum before then. I'm
6 not sure. I had Hibu make changes, and they didn't remove
7 that video.

8 Q The video's on your website now, isn't it?

9 A No.

10 Q Okay. Did you change something about the video but it's
11 still on your website?

12 A I changed my Hibu website, I think, in May, and they
13 failed to take the video down.

14 Q So the video's still on there as of today?

15 A No, it is not.

16 Q Were you present in the courtroom when Crystal Alcorn
17 testified?

18 A It is not on my website.

19 MS. RYAN: Your Honor, I don't want to be in the
20 position of testifying, but perhaps we can bring some
21 verifying information to the Court tomorrow morning, because
22 we actually looked at it.

23 THE COURT: We have a witness who's testified, we
24 have another witness who's testified, and it's up to me.
25 Let's proceed.

1 MS. RYAN: Thank you.

2 Q (BY MS. RYAN) Turn to Exhibit 17. It's in a different
3 binder.

4 A 17?

5 Q Do you have that in front of you?

6 A I do.

7 Q Is that an image from Progressive's website?

8 A Yes.

9 Q And what would be the date that that was on Progressive's
10 website?

11 A I'm sorry. I didn't hear you.

12 Q What date was it on the website? Would it help you if I
13 told you that in your deposition you testified that this was
14 how it looked? No? Okay.

15 A This is the website created for me in 2012.

16 Q So this is how your website -- looking at the logo part
17 of it, "Progressive" in large letters, "Lawn Managers"
18 smaller, is that how it looked prior to December 31, 2014?

19 A This website is no longer really in use. If I'm not
20 mistaken, I don't see where this redirects to
21 progressivelawnmanagement.com. This was the first website
22 created for me back in 2012 by Synergetic Marketing, but it
23 has undergone changes since then, but it no longer -- we use
24 PLMI.US, and so Synergetic's work is forwarded to my current
25 website.

1 Q I didn't ask you about your current website. I asked
2 you --

3 A This was created in 2012.

4 Q And was this how it looked -- was this how the logo,
5 name, et cetera, on your website looked prior to December 31,
6 2014?

7 A I am not sure.

8 Q Please turn to Exhibit 18. Is that the redesigned logo
9 that you began using after January 1, 2015?

10 A Actually, this was --

11 Q Just answer yes or no, please.

12 A No. 2014 -- November of 2014 is when we started working
13 on this one.

14 Q Why were you working on it in November of 2014?

15 A Because I had to change my name from "Lawn Managers" on
16 everything by the beginning of '15.

17 Q So you changed from a design where "Progressive" was
18 large relative to "Lawn Managers" to one where "Progressive"
19 is tiny compared to "Lawn Managers" at the end of 2014. Is
20 that your testimony?

21 A It was a new website builder. It was Hibu. And this is
22 the logo that we used for it, yes.

23 Q Okay. Please turn to Exhibit 30. Do you recognize that?

24 A Yes.

25 Q Is that a document that you produced during the discovery

1 in the case? Was this produced by you, given to Mr. Kelly,
2 and given to us?

3 A Yes.

4 Q And what is it?

5 A It's a trifold brochure that I mailed to my customers.

6 Q And you're still using this format?

7 A I believe so.

8 Q So on the first page of Exhibit 30 you've got a coupon;
9 correct?

10 A Yes.

11 Q And is that coupon -- turn to Exhibit 33, please. Is
12 that coupon virtually identical to --

13 A I'm sorry. What?

14 Q Thirty-three.

15 A Is it what?

16 Q Is it virtually identical to 33?

17 A No. I created this coupon early -- well, I created this
18 coupon years ago, while I was still at Lawn Managers.

19 Q What are you talking about?

20 A The \$40 coupon -- I had created that coupon years ago at
21 Lawn Managers.

22 Q You're referring to Exhibit 33?

23 A Yes. Only it said \$25 then.

24 Q Okay. And the coupon that appears on Exhibit 30 -- which
25 is your brochure; correct?

1 A Correct.

2 Q -- is identical except that it has a phone number;
3 correct?

4 A Correct. And it has --

5 Q What phone number is it?

6 A (636)394-1212.

7 Q And what number is that? Is that one of your business
8 phone numbers?

9 A Yes.

10 Q And then it has the word "Progressive" in small type next
11 to "Lawn Managers"; correct?

12 A Yes.

13 Q And you're still using this at the present time; correct?

14 A I ordered it last year.

15 Q Thank you. Did Progressive hire any consultants to
16 perform a survey to find out whether the Lawn Managers
17 trademark has lost its significance in the marketplace?

18 A No.

19 Q What is Progressive's standard program, treatment
20 program, for residential lawns?

21 A Usually, it's either five for commercial or six for
22 commercial or six to seven for residential, but I change them
23 every year pretty much to meet the St. Louis area needs of
24 insect control or different things. I change my product and
25 my applying at different times per what we're learning every

1 year.

2 Q And what is the quality of Progressive's work?

3 A I think it's exceptional.

4 Q So you're not saying that Progressive does poor quality
5 work, are you?

6 A No.

7 Q Did you attach GPS devices to some of Lawn Managers'
8 vehicles?

9 A Yes, I did.

10 Q And did you and other Progressive employees take
11 photographs of Lawn Managers' employees at work on lawns?

12 A Yes.

13 Q Now, there's been a little bit of testimony about a tree
14 suit?

15 A Yes.

16 Q You've just recently filed a lawsuit on that?

17 A I did.

18 Q And just briefly, what is your claim in that case?

19 A The day after my divorce was final, Randy had one of the
20 employees go to my home and spray my two and a half acres down
21 with weed control, and I had about \$100,000 damage on my trees
22 and shrubs.

23 Q Who was the employee?

24 A Mike Smith.

25 Q And who did he work for on -- what was the date of this

1 incident?

2 A The date of the incident was May 2.

3 Q And who did he work for on May 2?

4 A Lawn Managers.

5 Q That's your testimony?

6 A Yes.

7 Q Now, up to today's date, has Progressive ever told its
8 customers that it is a new company, separate from Lawn
9 Managers?

10 A We do the name change when we send all of our information
11 out.

12 Q What do you mean "name change"?

13 A All of our documentation says "Progressive Lawn Managers"
14 in bold.

15 Q So have you ever told your customers that Progressive is
16 a new company?

17 A I haven't formally written a letter or anything, no.

18 Q Isn't it true that as of a couple weeks ago, you're
19 telling customers, when they need to correct how their payment
20 is made, that you've changed the name of the company?

21 A I've been doing that for years.

22 Q Okay. And not that it's a new company, a different
23 company; right?

24 A I just tell them I've changed my name.

25 Q And doesn't that imply that Lawn Managers has changed its

1 name?

2 A I would never think that.

3 Q Can you explain why you didn't take steps to distinguish
4 Progressive Lawn Managers from Lawn Managers?

5 A I started taking the steps in 2012.

6 Q How come you've never told customers that Progressive is
7 a new company?

8 A I have put signage on my vehicles in early '13; so we
9 were going around in vehicles with "Progressive" very
10 prominent.

11 Q But you've never told customers that it's a new company;
12 correct?

13 A I've never sent any mailings out like that, no.

14 Q I would like you to turn to -- I don't know if she's got
15 it up there. Do you have Defendant's Exhibit --

16 MR. KELLY: I don't think I do. And we just noticed
17 that some of our exhibits are -- I think those are missing.
18 Let me check. Yeah, W-1 --

19 MS. RYAN: Your Honor, I offer --

20 THE COURT: Say again.

21 MS. RYAN: I'd like to offer these two pages to them
22 to examine. They think they don't have them with them.

23 MR. KELLY: Yeah. Thank you, yeah. We noticed some
24 of our -- absolutely fine.

25 MS. RYAN: Okay. Thank you.

1 Q (BY MS. RYAN) There's a screen in front of you. I'm just
2 going to lay it on here. And can you see that okay?

3 A Sure.

4 Q And is that a photograph of a Progressive vehicle?

5 A Yes.

6 Q Is it a van?

7 A Yes.

8 Q And what's the date on this photo?

9 A I took a picture of it, I think, maybe a month ago.

10 Q So it's your testimony that this is how this particular
11 vehicle looked as of a month ago?

12 A Yes.

13 MS. RYAN: Your Honor, I would like to switch over
14 to --

15 THE COURT: Now, I don't think you identified early
16 into the record what that exhibit number is.

17 MS. RYAN: That was W-1. Sorry.

18 Q (BY MS. RYAN) Do you have X-1 on the screen in front of
19 you?

20 A Yes.

21 Q And what is that a photo of?

22 A My little Scion.

23 Q And you still own that vehicle?

24 A Yes.

25 Q Have you had the signage on that changed in the last

1 couple of years?

2 A Yes.

3 Q When?

4 A Three times.

5 Q And when was this photograph taken?

6 A That photograph, I believe, was taken last year. I'm not
7 completely sure on that. I'm sorry.

8 MS. RYAN: Your Honor, I would like to offer Exhibits
9 17, 18, 111, and 30 into evidence.

10 MR. KELLY: No objection, Your Honor.

11 THE COURT: All right. They'll be received. So that
12 is 17, 18, 111, 30, 33, W-1, and X-1?

13 MS. RYAN: I haven't offered W-1 and X-1, Your Honor.
14 I don't think we know enough about them.

15 THE COURT: All right. All right.

16 MS. RYAN: Your Honor, I have nothing further at this
17 point.

18 THE COURT: Cross-examination?

19 MR. KELLY: Yes, Your Honor.

20 THE COURT: Now, is Ms. Smith going to be a joint
21 witness in her case, in the plaintiff's case and the
22 defendant's --

23 MR. KELLY: Yes.

24 MS. RYAN: Well, that wasn't my intention, Your
25 Honor, but --

1 THE COURT: Well, that's the question, not so much
2 for you. I know that it's --

3 MR. KELLY: Yeah. So this raises a point. Is the
4 plaintiff resting at this point? It sounds like they have a
5 rebuttal witness, but it sounds like they're resting their
6 main case.

7 THE COURT: Well, you're up -- I'm going to ask you
8 to proceed, and we're not going to get into that -- into any
9 motion practice just now, but I'll direct you to proceed by
10 noncross-examination. Proceed by --

11 MR. KELLY: Direct.

12 THE COURT: By direct examination for the purpose of
13 placing her evidence, her testimony, into the defendant's
14 case. All right.

15 **DIRECT EXAMINATION**

16 **BY MR. KELLY:**

17 Q Linda, can you tell us when you formed Progressive Lawn
18 Managers?

19 A February of 2012.

20 Q And I will put on the screen Plaintiff's Exhibit 2. And
21 is that a copy of the articles of incorporation for
22 Progressive?

23 A Yes. Yes.

24 Q And it was formed when?

25 A I think it was February. Does it say here?

1 Q Well, we can certainly help you and turn the page.

2 A It was in February. February 25 of 2012.

3 Q And was that done in furtherance of you separating from
4 Randy?

5 A Yes.

6 Q And for a period of time did you operate out of the same
7 building?

8 A A few days, I think.

9 Q And relative to that, when did the transfer of accounts
10 occur?

11 A 4/25/2012.

12 Q And how were those accounts transferred to you?

13 A By Peter Brown with Real Green.

14 Q You obtained a new location at some time?

15 A I had been working on a new location since November of
16 '11.

17 Q And where was that new location?

18 A 120 Old Meramec Station Road.

19 Q And are you still there today?

20 A Yes.

21 Q And can you describe the location for us?

22 A It's in Manchester on Old Meramec Station Road, before
23 you get to Manchester Road. It's an old highway, I guess you
24 could call it.

25 Q Would it be fair to say it's behind a strip mall?

1 A Yes.

2 Q How many employees did you have when you started?

3 A In 2012?

4 Q Yes.

5 A Seven or eight, I believe.

6 Q I handed you what's been marked as Plaintiff's Exhibit
7 H-2. Can you tell the Court what that is?

8 A This is a customer cancel report.

9 Q I think I know what it is. Is that the list of your
10 customers when you started?

11 A This --

12 THE COURT: You said --

13 A Yes.

14 THE COURT: -- Plaintiff's Exhibit H-2, but isn't it
15 defendant's?

16 MR. KELLY: Correct. Thank you, Your Honor.

17 THE COURT: Sure.

18 A This is a report that Peter Brown ran, I believe, when he
19 did the transfer on 4/25/12.

20 Q Who is Peter Brown?

21 A He's basically the one that wrote the program for Real
22 Green that we both use.

23 Q Is that your data processing program?

24 A Yes.

25 Q And is that a customer relations management program, I

1 should say?

2 A It's a software program for the green industry.

3 Q Green? You mean lawn care companies?

4 A Green industries. Some people use it for pest. You can
5 essentially use it for whatever you want.

6 Q Now, handing you that. And I've just handed you what's
7 marked as Plaintiff's Exhibit 13, and could you tell us what
8 that is?

9 A It is my divorce decree and separation agreement.

10 Q It's the one that you feel is applicable; correct?

11 A May 1? Yes.

12 Q With respect to that decree, can you tell us how accounts
13 were divided?

14 A Randy and I came to an agreement of a 60/40 split; so I
15 was to get 40 percent of the customer base that we had as
16 revenue and a continuing business, and he was supposed to get
17 60 percent.

18 Q Okay. And how many zip codes did you get?

19 A Nineteen.

20 Q And how many zip codes did Randy get?

21 A Fifty-two.

22 Q And I'm not suggesting that there was a disparity in
23 terms of -- but was that about approximate I mean revenue-wise
24 19 to 52 --

25 A Yes, it would have been.

1 Q Approximately the same?

2 A Yes.

3 Q If I can see Exhibit 13 again. Thank you. In fact, you
4 have books up here. Yes, you can look at Exhibit 13 in that
5 one.

6 A Okay.

7 Q You were a half owner of Lawn Managers, weren't you?

8 A Yes.

9 Q Did that agreement have a nonsolicitation provision to
10 it?

11 A Yes.

12 Q And the split of the zip codes, what section of the
13 agreement was that?

14 A Page 8.

15 Q Under Section 5; is that correct?

16 A So sorry. Yes.

17 Q And would you turn to page 9, please. And under that
18 Section 2-A, residential accounts, of Section 5.02, what does
19 it say?

20 A Residential accounts. A, accounts ordered to Linda.
21 Linda's awarded all right, title, and interest in all the
22 residential accounts and accounts receivable of the
23 corporation in the following zip codes.

24 Q Now, would you turn to Section 5.06.

25 A Do you know what page?

1 Q Page 15. And the start of that section, is that the
2 section that indicates that you may use the name "Lawn
3 Managers" for a period of time no longer than two years?

4 A Yes.

5 Q Would you turn to the next page, same section. And would
6 you read to the Court the second paragraph from the bottom.

7 A Starting with "Randy and Linda acknowledge"?

8 Q I believe it starts "Randy and Linda agree"?

9 A "Randy and Linda agree that if either of them wishes to
10 sell any of their commercial accounts or any of their
11 residential accounts as referenced in Section 5.02, that each
12 of them will give the other party the first opportunity to
13 purchase the accounts that are up for sale."

14 Q Now, approximately how many accounts did you get pursuant
15 to the decree in 2012?

16 A Approximately 1,900.

17 Q And so that record is clear, is that accounts to which
18 you were awarded all right, title, and interest?

19 A Yes.

20 Q Has Randy ever approached you about purchasing any of the
21 accounts that have been awarded to you?

22 A No.

23 Q Under that decree were you allowed to use the premises of
24 Lawn Managers in its High Ridge location for a period of time?

25 A Yes.

1 Q How long?

2 A It was supposed to be till December 31 of 2012, I
3 believe.

4 Q Now, was there anything in that decree, to your
5 knowledge, that gave Randy the right to control how you used
6 the name "Lawn Managers"?

7 A No.

8 Q Was there any restriction in favor of Randy as to what
9 logos or colors you could use?

10 A No.

11 Q Did it say how you were supposed to use the name
12 "Progressive Lawn Managers"?

13 A No.

14 Q Did the decree provide for what your company and Randy's
15 company was supposed to tell the customers about the division
16 of accounts?

17 A No.

18 Q Did it even provide you had to inform them?

19 A No.

20 Q Now, let me talk to you about right after the divorce.

21 You received the accounts. Did you also receive some trucks?

22 A Yes.

23 MS. RYAN: Your Honor, if I could just object briefly
24 for a moment. If we're going to try the entire Hillsboro case
25 and go through the entire history of the parties, I think it's

1 not a good use of time. We entered into a stipulation that's
2 been filed with the Court. The joint stipulation of facts
3 goes into all of this background information about the
4 division of accounts. All the zip codes are in there.
5 Division of trucks is talked about.

6 THE COURT: All right. You have a response to the
7 objection?

8 MR. KELLY: Yeah. I'm not sure what she's talking
9 about. There's nothing in the stipulation about trucks.
10 There's nothing in the stipulations about the right to control
11 use of any of the names. There's nothing in the stipulations
12 about the colors or logos, what I just asked.

13 THE COURT: All right. I'm going to overrule the
14 objection. Let's proceed.

15 Q (BY MR. KELLY) So as part of the split, did you obtain
16 some trucks that Lawn Managers had?

17 A Yes.

18 Q What vehicles did you get?

19 A I believe I had four vans, two huge trucks with three- to
20 six-hundred gallon tanks. I had my GMC. I had Randy's
21 Cadillac. I wasn't to get it.

22 Q Let me ask you about the service vehicles.

23 A Okay.

24 Q Did they have any signage on them?

25 A Yes.

1 Q And what was that?

2 A It was a pretty much dark blue with a light colored in it
3 with "Lawn Managers" written across it with no phone number, I
4 don't think.

5 Q The text "Lawn Managers"?

6 A I'm sorry?

7 Q The text "Lawn Managers"?

8 A Yes.

9 Q Did any of those service vehicles at that time have the
10 words "Progressive Lawn Managers" on it?

11 A No.

12 Q Now, as part of this split, did some employees go with
13 your company and some stay with Lawn Managers?

14 A Yes.

15 Q How many of those employees did you acquire or your
16 company acquire?

17 A I think seven, six or seven.

18 Q Let me ask you about the companies who work the field.
19 Were they wearing uniforms?

20 A Yes.

21 Q And did those uniforms have a company name on them?

22 A Yes.

23 Q What did the company name say?

24 A "Lawn Managers."

25 Q And how long did those employees use those uniforms?

1 A Until the end of 2014.

2 Q How long did you use the service vehicles with "Lawn
3 Managers" on them?

4 A I began using some service vehicles in 2013 that had my
5 name, earlier '13, "Progressive," and then I kept the others
6 as well because I didn't have enough money to change them all
7 at the time.

8 Q So during that two-and-a-half-year period you were mixing
9 logos on your vehicles? Some were Progressive? Some were
10 Lawn Managers?

11 A On each vehicle. There were never the same logo on two
12 vehicles. At -- different logos on two vehicles.

13 Q Linda, I'm going to put up -- excuse me. Ms. Smith, I'm
14 going to put up on the ELMO --

15 THE COURT: So just so I'm clear, that during 2013
16 some vehicles used by the witness had "Progressive Lawn
17 Managers" on it and some had just "Lawn Managers"?

18 THE WITNESS: Yes.

19 THE COURT: Okay.

20 Q (BY MR. KELLY) Ms. Smith, I put up on the projector,
21 trying to get some resolution here, some photographs. Do you
22 recognize those?

23 A Yes.

24 Q And for the record, this is Plaintiff's Exhibit 15. What
25 do those show?

1 A That shows what our vehicles looked like before I changed
2 some of them.

3 Q And it's not clear on the projected image, but you can
4 see it in the paper image in front of you, I think. What is
5 written on that signage?

6 A "Lawn Managers."

7 Q And is there a phone number?

8 A I cannot make the phone number out. Yes, there is.

9 Q And what phone number is that?

10 A Can you hold it still? I'm sorry. (636)677-1122.

11 Q And whose number is that?

12 A Mine.

13 Q Also contained in Exhibit 15, on the third page, is the
14 image of the front end of a truck. Can you identify that?

15 A That was how that truck looked when we first left Lawn
16 Managers in High Ridge.

17 Q Is that a different vehicle than the ones we looked at on
18 the front page of Exhibit 15?

19 A It's the same vehicle. It just the other pictures showed
20 the tanks. This shows the door.

21 Q That is the front end of the top picture on the first
22 page of 15; is that correct?

23 A Yes.

24 Q And how long did you use that vehicle shown on the third
25 page of 15?

1 A If I'm not mistaken, we had changed one of those type of
2 vehicles to look like the Progressive and left that one the
3 same until the end of '14, when we began to try to change the
4 logo.

5 MR. KELLY: I'm going to have to borrow one of your
6 copies of my exhibits, W-1.

7 THE COURT: Seventy-one?

8 MR. KELLY: W-1, Your Honor. That is one of the ones
9 that looks like it may not have made it through to our -- yes.
10 Oh, Mr. Hurst has proved his worth. He found it. Thank you.

11 MS. RYAN: This is the one I just asked her about a
12 little while ago?

13 MR. KELLY: Yes. Correct. Is it not?

14 MS. RYAN: It is.

15 MR. KELLY: I've got it on the projector, Your Honor.

16 THE COURT: All right.

17 Q (BY MR. KELLY) Ms. Smith, I would like to ask you about
18 this Exhibit W-1, which you were inquired of in your
19 testimony. When did you start using this van, if you
20 remember?

21 A Early in probably May of 2013.

22 Q Don't remember the exact time?

23 A No.

24 Q So sometime in 2013?

25 A Early in '13, yes.

1 Q Let's go through this picture. It looks like you've got
2 the text "Progressive Lawn Managers" on there; is that right?

3 A Yes.

4 Q And there's some type of logo in the back. Can you tell
5 us what that logo is at the back of the van?

6 A It was supposed to be grass coming up inside of a blue,
7 light blue kind of a round circle.

8 Q It also looks like to me that if I look down at the
9 bottom of this van, it looks like there's some type of grass
10 imagery at the bottom of the van?

11 A Yes, sir.

12 Q And that's got your company's phone number; is that
13 correct?

14 A Yes.

15 Q How long did you use this van?

16 A We're still using it. So sometime early mid '13 till
17 today.

18 Q Till today. When was the first time you used any type of
19 signage with the word "Progressive" on it after the May
20 divorce?

21 A In May of '13, I believe it was. Early '13.

22 Q So would it be fair to say that from May of 2013 to the
23 end of 2014, you were using signage with both "Lawn Managers"
24 and both "Progressive Lawn Managers"?

25 A Yes.

1 Q There were some contempt proceedings between you and
2 Randy in 2013 and 2014?

3 A Yes.

4 Q Don't want to ask you about 2013. I want to ask you
5 about 2014. Just explain briefly what the nature of those
6 were and how we got to the July 2014 orders. What were the
7 nature of the proceedings or the allegations that you made
8 against Randy?

9 A The '14 proceedings, first of all, have to do with money
10 still owing me from 2012; so that was a big issue. It was
11 right at around 80,000 I believe.

12 And then I had already learned that Randy had taken
13 several of my big accounts, especially in Ladue, Creve Coeur,
14 Kirkwood, and was servicing them. So I was trying to get
15 relief from the Court for the revenue from my customers that I
16 had lost.

17 Q You were accusing him of being in your zip codes
18 improperly?

19 A Yes.

20 Q And servicing customers he shouldn't under the divorce
21 decree?

22 A Yes.

23 Q And did he make some allegations against you?

24 A I think I was held in contempt from not making the
25 Flagstar payments.

1 Q Okay. And talking about the allegations that resulted
2 in, I believe it was, Exhibit 12 -- and this is a copy of the
3 2012 decree; is that right?

4 A This is a new court order.

5 Q Yeah.

6 A Yes.

7 Q You recognize that as the court order that resulted from
8 the dueling contempt proceedings in 2014?

9 A Yes.

10 Q It's in your book in front of you, Ms. Smith.

11 MS. RYAN: Don, what exhibit are you talking about?

12 MR. KELLY: 12.

13 Q (BY MR. KELLY) I'm not going to go through the whole
14 exhibit with you, but just to quickly summarize through it to
15 get to some questions, this agreement reaffirmed your right to
16 use the name "Progressive Lawn Managers"; is that true?

17 A Yes.

18 Q And it extended the right for your company to use "Lawn
19 Managers" through the end of 2014?

20 A Yes.

21 Q And I understand that there was a provision in this
22 decree about transferring accounts in certain zip codes?

23 A Two separate zip codes, yes.

24 Q What were those?

25 A 63038 and 63040.

1 Q And how were those customers transferred to you?

2 A By Peter Brown at Real Green systems. Actually, he
3 provided the reports, and we had to manually enter them in.

4 Q Okay. Now, between the time of May 2012 to this decree,
5 had you formally transferred any accounts to Randy?

6 A No.

7 Q And pursuant to this decree and your understanding of it,
8 were you transferring any accounts to Randy?

9 A No.

10 Q And there was a payment by Mr. Zweifel to you under this
11 court order?

12 A Yes.

13 Q And is there any provision in this decree that you
14 recognize as him buying any of the customers he acknowledged
15 servicing before this decree?

16 A No.

17 Q And to put some sort of perspective on it, prior to July
18 of 2014, the decree had a nonsolicitation provision?

19 A Yes.

20 Q And explain what that was to the Court.

21 A I believed it to mean we weren't going to take any
22 customers in each other's zip codes.

23 Q Okay. So you're not supposed to solicit in each other's
24 zip codes; correct?

25 A Yes.

1 Q And then pursuant to this decree, it changed. It became
2 a complete noncompete for residential customers?

3 A Yes.

4 Q They were allowed to sign up new commercial accounts and
5 new miscellaneous accounts?

6 A Yes.

7 Q And am I correct that the noncompete for residential
8 customers was extended to July of 2016?

9 A No. December 31 of 2014. Oh. Oh, I'm sorry. Yes.

10 Q And was there anything in this order that you understood
11 that said that as of July 25, 2016, your customers to which
12 you had been given all right, title, and interest were up for
13 grabs and could be solicited?

14 A No.

15 Q Would you turn to Exhibit 8, Ms. Smith. Have you turned
16 to Exhibit 8?

17 A I'm sorry. Yes.

18 Q And you received this sometime when?

19 A Sometime in November.

20 Q 2015?

21 A Yes.

22 Q And had anybody from Lawn Managers told you there was
23 anything wrong with your way your signs looked prior to this
24 time?

25 A No.

1 Q And what did you do after you received this letter?

2 A I called the number on the letter and got a voicemail
3 only with a man's voice, and said that I would like to speak
4 about this. And I left my business number to be called back.
5 I never received a phone call back; so I took it, I believe,
6 to my attorney in Hillsboro.

7 Q Mr. Roberts?

8 A Kevin Roberts. And --

9 Q All right. And to your understanding, did he prepare a
10 response back?

11 A Yes.

12 Q Had you been made aware prior to the divorce that the
13 company had filed a trademark application?

14 A No.

15 Q Do you understand the significance of a trademark
16 registration?

17 A I do now.

18 Q You think you do?

19 A Well, it's very limited, but I've learned a lot.

20 Q Now, looking at this Exhibit 8, would you read it one
21 sentence at a time, please.

22 A "Dear Mrs. Smith. We represent Lawn Managers in their
23 trademark matters. It has been brought to our client's
24 attention that your continued use of 'Lawn Managers' is not
25 proper trademark use. Your company name is 'Progressive Lawn

1 Managers.' Therefore, the phrase 'Lawn Managers' should be
2 the same size, type, and style as 'Progressive' as you have
3 used it on your website."

4 Q Thank you. So at this point it's indicating that the
5 usage on your website was okay?

6 A Yes.

7 Q Now, do you have a recollection when you received this
8 letter of ever having seen Lawn Managers' logo other than
9 yellow or green?

10 A Yes.

11 Q And what was that?

12 A They started changing colors.

13 Q And when was that, to your recall?

14 A I would say sometime latter '13.

15 Q Now, what kind of trucks was Lawn Managers using after --
16 immediately after the divorce?

17 A The same trucks.

18 Q The same trucks as Progressive?

19 A Yes. We were all using the same vehicles.

20 Q Was the lettering the same?

21 A Yes.

22 Q Was there any type of Lawn Managers logo on those trucks?

23 A I don't recall the feet being on the original trucks.

24 Q Putting before you on the prompter Plaintiff's Exhibit
25 17, I believe you were asked about that in your direct.

1 A Yes.

2 Q And is that an image of one of your websites?

3 A This was the original website.

4 Q By "you," I mean Progressive.

5 A Yes.

6 Q Now, is it correct that you actually have several domain
7 names?

8 A Yes.

9 Q Which you --

10 A Yes.

11 Q Do you recall what domain name this website appeared
12 under?

13 A This website was put under progressivelawnmanagement.com
14 as a error by Synergetic Marketing in Michigan.

15 Q Do you have a main website that you have used?

16 A That would have been the main one before Hibu.

17 Q For the record, Hibu is a website developer?

18 A Yes.

19 Q So you were looking at this, and it had this lettering up
20 at the top, the "Progressive"?

21 A Yes.

22 Q And you elected to change that?

23 A I never liked this logo.

24 Q In fact, it's skewed; correct?

25 A I feel like it goes up at the end too much

1 inconsistently.

2 Q Somebody else made it for you?

3 A Yes.

4 Q Wanted them to change it. And you thought that that was
5 an improvement?

6 A Yes.

7 Q Can you tell the Court --

8 MS. RYAN: Do you have an exhibit number?

9 MR. KELLY: Exhibit 18. Thank you.

10 Q (BY MR. KELLY) Can you tell the Court why you thought this
11 graphic was an improvement?

12 A I had very limited funds in 2013, but I wanted to start
13 branding my name to my customers, my current customers. So I
14 had someone create the previous that we looked at. Never
15 really liked it. I hired Extreme Wrap in South County,
16 Missouri to wrap as many vehicles as I could afford at the
17 time, and it was, in my estimation, very shoddy work.

18 Q As far as the image, did you like this image better than
19 just the block lettering?

20 A Yes.

21 Q Did you feel that the Arch and the grass in the circle
22 made your name or logo distinctive?

23 A Well, I had already had a round area in my previous logo
24 that people were seeing with the grass in it. I just thought
25 putting the St. Louis Arch in it would brand it as a St. Louis

1 company, which it is.

2 Q Okay. And you're talking about the circle right there on
3 Exhibit 17?

4 A Yes.

5 Q And how long had you been using that little circle with
6 the grass in it?

7 A Since early '13.

8 Q And I take it you liked it?

9 A That was part of the logo.

10 Q And to your knowledge, did Lawn Managers have anything
11 similar to that on their signage?

12 A No.

13 Q Did any other company, to your knowledge, have anything
14 similar?

15 A No.

16 Q Putting on the display Exhibit 99, can you tell me what
17 that is?

18 A That is my website.

19 Q As it currently appears now?

20 A Yes.

21 Q And there's a print date of July 6, 2017?

22 A That's the day I printed up the screen.

23 Q And this is actually a Lawn Managers --

24 A I'm sorry. What?

25 Q This is a Lawn Managers document, 99. Okay.

1 A I believe that I -- I thought I printed that up, but I
2 guess it is Lawn Managers.

3 Q So you corrected your website?

4 A Yes.

5 Q And that was because of this lawsuit and the allegations?

6 A Yes.

7 Q You've actually now moved the word "Progressive" on the
8 name to the left of the word "Lawn Managers"?

9 A Yes.

10 Q When did you make this change?

11 A I want to say May of this year.

12 Q And let me ask you when you made that change, who did you
13 ask to make the change?

14 A Hibu.

15 Q I assume you're not proficient in website design; is that
16 right?

17 A I don't think I have access to it.

18 Q When you asked Hibu to change your website, did you also
19 tell them to fix the video?

20 A Yes. I said everything needed to be "Progressive Lawn
21 Managers" all the same font, typeset -- everything. They
22 messed it up a couple of times, actually.

23 Q And did you instruct them, actually, to pull the video
24 down?

25 A Yes, I did.

1 Q And is that video up, to your knowledge?

2 A It is not up.

3 Q Now, this website that we were showing in 99, what is the
4 domain name for that?

5 A In 99?

6 Q On Exhibit 99. How do we get to that website? What's
7 the web address; do you know? Can I show you?

8 A Can you put it back down? That's PLMI.US.

9 Q Okay. You were -- it was brought up that you own a
10 domain name with "Lawn Managers" in it?

11 A Yes.

12 Q When did you acquire that?

13 A I want to say in '13.

14 Q When you were allowed to do business as Lawn Managers;
15 correct?

16 A Yes.

17 Q And is that domain active?

18 A PLMI? Oh, no.

19 Q Lawn Managers --

20 A No, it is not.

21 Q And it's been taken down?

22 A Whatever you call -- I called them and told them to
23 suspend it or whatever they do. I don't know the verbiage.

24 Q If you type in the address, you don't come to a
25 Progressive Lawn Managers site, do you?

1 A No.

2 Q And how long has that been the case?

3 A Oh, I want to say early in 2017. I don't know for sure,
4 though. It could have been '16.

5 Q You were shown some pictures of vehicles. Let me show
6 you what's been marked as Plaintiff's Exhibit 106. The first
7 page, what is that?

8 MS. RYAN: Your Honor, we had -- when we first
9 started the trial and we talked about withdrawing exhibits,
10 and were waiting to do it, this is an exhibit that I had
11 intended to withdraw. So if defendant has an equivalent
12 exhibit somewhere, that's fine, but I really object to having
13 106 used, because I'm withdrawing it.

14 THE COURT: Let me take a look.

15 MR. KELLY: I think it's also Defendant's Exhibit
16 I-2.

17 THE COURT: I-2?

18 MR. KELLY: I-2, Your Honor.

19 THE COURT: That's fine. This is an exhibit that the
20 plaintiff has not used, and when I looked for that number in
21 the three-ring binder, it was just a place keeper saying
22 "withdrawn." So it's not available under that number.

23 MR. KELLY: Okay. Then I-2 it is.

24 Q (BY MR. KELLY) Ms. Smith, I would like you to look at the
25 first page of Exhibit I-2. And what does that show?

1 A That shows my little Scion as it looks now.

2 Q And how long ago did you change it to look like this?

3 A January or February of 2017.

4 Q And I'm going to show you the second page of Exhibit I-2.

5 What does that show?

6 A That's my sign on my building, my front door.

7 Q Is that there presently?

8 A Yes.

9 Q How long has it been there?

10 A Since 2013.

11 Q I'm showing you now the third page of Exhibit I-2. What
12 does that show?

13 A That's my building banner as it looks now.

14 Q And when did you change the banner?

15 A I think late April, probably, of 2017. I'm sorry.

16 Q This would be the fifth page of Exhibit I-2.

17 A That's my GMC Super Duty as it looks today.

18 Q How long has it looked like that?

19 A Since 2013.

20 Q I'm showing you now the sixth page of Exhibit I-2. What
21 does that show?

22 A That's the flatbed with the big tank on it as it looks
23 today.

24 Q And how long has that little signage been on that truck?

25 A The same time as the little sign which was, I think, I

1 want to say, probably the end of January of this year.

2 Q The next page of Exhibit I-2, please tell the Court what
3 this is.

4 A That's the tank of the door you showed me just a moment
5 ago.

6 Q How long has that signage been on that tank?

7 A The beginning of 2017.

8 Q And by "tank," that's a tank that's actually on a truck?

9 A Yes.

10 Q The next page of Exhibit I-2, what does that show?

11 A That's a van as it looks today.

12 Q How long has it looked like that?

13 A Since 2013.

14 Q And that also has the green grass down at the bottom?

15 A Yes.

16 Q Is the next image a --

17 THE COURT: I'm going to ask you to state the number
18 of the page. I think we're up to 8, but I'm at page 8, but --

19 MR. KELLY: Sorry, Your Honor. Yes. This one is 9.

20 THE COURT: Okay.

21 Q (BY MR. KELLY) This is page 9 of Exhibit I-2.

22 A That's also a van as it looks today.

23 Q Is that a different van or the same van as the previous
24 page?

25 A I can't see the dent. That's how I can tell the

1 difference. I just took some photographs, and I have a couple
2 of my vans that look like that.

3 Q And have they looked like that since 2013?

4 A Yes.

5 Q And this is page 10. And what does this show?

6 A My little Scion.

7 Q As it looks today?

8 A Yes.

9 Q And when was that changed again?

10 A Early of 2017.

11 MR. KELLY: Excuse me, B-2. B-2 is -- B-2 -- you
12 haven't used 25, have you?

13 MS. RYAN: I don't think so.

14 Q (BY MR. KELLY) Ms. Smith, I'm showing what's been marked
15 as Defendant's Exhibit B-2, and I'd ask you to identify that
16 for the Court, please.

17 A That's my folder that I leave my estimates at homes. Say
18 a new customer called me and wants me to do an estimate or a
19 seeding estimate or any kind of estimate, I put the paperwork
20 inside of that folder.

21 Q And how long have you used that?

22 A I believe that print happened in the beginning of '15.

23 Q And you've used it since?

24 A Yes.

25 Q Showing you what was marked as Plaintiff's Exhibit 37,

1 and can you identify that for the record, please?

2 A Yes. That's a marketing letter sent to 1210 Devonworth
3 Drive, it looks like.

4 Q What type of document is this?

5 A It's our mass mailing document.

6 Q And how long have you been using a mass mailing like
7 that?

8 A Twenty years. Well, many years.

9 Q And as I see it, other than the word "save," would the
10 words "Progressive Lawn Managers" be the most prominent
11 lettering on that?

12 A I think it is.

13 Q You've also got what you thought was your pretty design
14 next to it?

15 A Yes.

16 THE COURT: I think at this time we're going to break
17 for the day.

18 MR. KELLY: Okay.

19 THE COURT: And I have some matters in the courtroom
20 at 8:45 tomorrow that should not go too much past nine. So I
21 will just ask counsel -- you don't have to take everything off
22 the table, or I don't know where -- are you using the separate
23 conference rooms?

24 MR. KELLY: No.

25 THE COURT: Well, that's fine. Just perhaps if you

1 leave things in the courtroom, put them at one end of the
2 table. And so we will, you know, recess until tomorrow
3 morning at nine o'clock and, you know, take the usual breaks,
4 and we'll probably work until 4:30 or 5:00 tomorrow.

5 MR. KELLY: For the Court's -- do you think we are
6 going to go that late?

7 MS. RYAN: We may not, Your Honor, but --

8 THE COURT: Okay.

9 MS. RYAN: We'll have to see. It would be nice for
10 all of us.

11 THE COURT: All right. Thank you very much.

12 MS. RYAN: Thank you.

13 THE COURT: We'll be in recess.

14 **(PROCEEDINGS CONCLUDED AT 4:15 PM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 160 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 28th day of November, 2017.

/s/Shannon L White
/s/Shannon L. White
Shannon L. White, CRR, RMR, CCR, CSR
Official Court Reporter